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CONVEYANCER'S NOTEBOOK.

In this the sixth, and may we hope the last, year of war, we trust that no further changes in the format of this Journal may be necessary. The thinness of the last volumes compared with their predecessors is in large measure due not only to war-time paper but also to the smaller type and margins which the present format imposes upon us. It is hoped, however, that subscribers do not find any real difficulty in legibility or convenience.

After five years of war the Editors would like to take this opportunity of thanking subscribers for their continued support in difficult times. At the same time they would very much appreciate any suggestions either for precedents or articles on subjects which they have met in their own practice. Precedents of an unusual character which have been drawn would also be welcomed and if accepted for publication would be paid for at the usual rates. We should also be glad to consider articles, particularly articles arising out of some investigation of the law arising from a practical problem in chambers or in the office.

At the moment the spate of war-time legislation has died down and even the number of material statutory rules and orders has slackened off. We fear that it is the lull before the storm of post-war planning. Whether this legislation will provide a similar spate of rules and orders it is not easy to foresee, but it seems not improbable. With this type of legislation it is peculiarly difficult to maintain contact, and owing to the comparative ease with which changes can be made it is very convenient to the administrator while it has the additional danger of lulling the practitioner into the belief that he is up-to-date. It is, however, a major problem of the growth of statute law that is not primarily within our province.

The innumerable odds and ends that have been inevitable in war-time have prevented us from continuing the series of connected articles with which we began this Journal in the new series. We hope, however, to renew the practice, and as we find from practical experience that con-

current interests in land continue to present considerable difficulties we are proposing to have a series of articles dealing with the present position of the law on that subject.

The problem of planning.—After all the discussions concerning the Uthwatt Report the Government has issued a White Paper that has discarded the scientific attitude contained in that report. It is regarded as unpractical, though quite in what way it is unpractical the White Paper rather illusively describes. The White Paper, therefore, provides a *practical* solution to the problem which, of course, means that it is a piecemeal solution that almost certainly will not cause the burdens to fall equally, and will probably result in a whole variety of devices not unlike those which have blotted the pages of tax evasion by which the wily hope to cast their share of the burden, so far as possible, on the less wily or possibly the more public spirited.

The whole of England and Wales is to be divided into three types of area. The developed urban area, the undeveloped urban area, and the rural area. Where there is no development this may come either by compulsory purchase or by private development. Development may equally be prevented, and this prevention will be effected by requiring any development to receive consent from the planning authority.

If development takes place the value of the land will increase—betterment. If development is prevented, compensation will be payable. So far as compensation is concerned the individual right to compensation is to be determined at once, but the level of compensation will not be ascertained until after five years. Presumably this follows the sort of lines of war damage where the unfortunate owner gets in theory a value payment, only the value payment is not made notwithstanding other obligations remain. The fact that a Government Department is not much affected by whether payments are made next day (very unlikely), next month (rather improbable), next year or not until five years hence seems to blind administrators to the fact that the ordinary citizen suffers considerable hardship if his assets are " frozen " for a period of time. In a war this may be necessary, though frankly we doubt it; in peace-time such an arrangement becomes intolerable.

On the other hand the proposal to ascertain the existence of a " development value ", that is, that the land might be contemplated for development, as from March 31, 1939, seems to be sound. If land had a development value at that date compensation will be payable if development is refused. If it had no development value at that date, compensation will never be payable. The element of unfairness that lies here is in another direction, namely, that if A has land of no development in 1939 and he is refused permission to develop he gets nothing, whereas if B has land having no development value in 1939 and he gets permission to develop it he may receive 20 per cent. of the increased value, the remaining 80 per cent. going, at least in theory, into the Exchequer, or rather a Land Commission, in order to defray the compensation in the case of permissions refused where the land had development value in 1939.

No doubt equality in this world is something that is *practically*

impossible to attain, but there must be few legislative provisions in this country so calculated to give effect to the saying, " to him that hath not it shall be taken away ". It does not seem to require more initiative to apply for consent and be refused than to apply for consent and obtain it, and it is to encourage such initiative that the 20 per cent. offer is made by the Government. This betterment charge of 80 per cent. is not to be levied in full where there was a development value in 1939. So presumably if land was worth £25 per acre in 1939 with a betterment value of £10 and was sold in 1945 for £55 per acre, then £20 would be betterment for the purposes of the betterment charge and £16 payable to the Land Commission.

In order to deal with these complicated problems a Land Commission is to be set up answerable to Parliament through a Minister but not subject to any department. This is laid down in the White Paper, but what is not laid down is the machinery by which those increased values are to be determined. It is, presumably, the increased value of the land that is subject to the betterment charge and not any increase due to the works of man upon the land. For example, if the land is drained it may automatically become more valuable, and it obviously would not be fair to assess the whole of the increase to " betterment "; the machinery for determining the proportions may be difficult. Presumably, the " betterment charge " comes into existence so soon as consent to development is granted, but it is difficult to see how the value of the increase can be determined at that date. What is more, such increase may easily be added to, for example, by the planning of fresh facilities for communication, which are just as much within the principle of " betterment " as viewed in the Uthwatt Report as development value at the date of consent. But what is more difficult still is to see how from a conveyancing point of view this " betterment charge " is to be collected by the Government and be paid by the proper person. Stamp duties are, of course, paid by the Purchaser, and unless the " betterment charge " can be anticipated in the completion statement there seems to be no adequate method of ensuring that it will be paid by the Vendor. It must be remembered that in large transactions the " betterment charge " should be a very substantial sum representing in fact a great deal more than the amount going into the pocket of the Vendor. It may be true that the White Paper is more practical than the Uthwatt Report, but it is thought that much more elaborate plans will need to be laid for the proposals there made than appear in the paper itself.

From the point of view of lawyers some initial considerations are the persons who may be regarded as having any interest in betterment. Under the old law regarding compulsory acquisition not only the owner or owners of the fee simple were entitled but, for example, adjoining owners could claim for " injurious affection ". Likewise, if A develops his estate for building, B, who owns the adjoining estate, clearly gets an advantage which no doubt will have to meet a " betterment charge " should B develop his land. But supposing A's application for consent is refused, can B also claim compensation?

Similarly, rights over the land, such as those enjoyed by owners of easements or profits, are affected by these new schemes. Such an easement may become more valuable if the land is required for development

because, in fact, a release frequently is sought for valuable consideration. Does this carry a "betterment charge"? It is one of the essential problems of land law that many and diverse interests are involved and only the most profound knowledge of real property and the most careful draftsmanship can avoid innumerable problems, as has already been emphasised in the comparatively elementary proposition involved in the Tithe Redemption Act, 1936.

This vagueness may threaten a statute in which all these "details" are to be left to be determined by Statutory Rules and Orders to be made from time to time. If this is the case we think protest should be made. It has been a first principle of our constitutional law that the rights of private citizens in their property as well as in their person should not be interfered with save by the clearest words contained in an Act of Parliament. This war's experience will not tempt us to believe that Statutory Rules and Orders can be regarded as good substitutes.

So far we have not mentioned the problem of compulsory acquisition. This is obviously an essential part of the planning scheme, but it seems to have a like effect so far as the owner is concerned with the prevention of development. Whether this will encourage compulsory acquisition we do not know, but we do suggest that any owner, who contemplates development himself, will obviously prove as obstructive as possible in the hope that the authority will try some easier "game". In other words the less public spirited an owner is the more likely is he to take a part in the development of the countryside. Whether our administrators are confident that they can always keep the landowner down or whether they think the proposition in the last sentence immaterial it is hard to say. Looking at life in general with some fair experience of life in the country we should be tempted to say that if land-owning may be regarded as a "business" the standard of "public spiritedness" is extremely high compared with the business world as a whole. But if we look at the professional "land developer" who is likely to go for the 20 per cent. betterment we are not confident that the motto is not more nearly "business is business". It seems to us that this White Paper plays directly into the hands of this class to the detriment of the other. Does the Government really wish to do this, and can it really be said to be in the interests of the country?

The significance of legal history.—Our contemporary, the *Law Journal*, has contained two articles on the Study of Legal History—one in which its advantages were laid out and the other in which the case against it was stated. It is not for us to adjudicate between the rivals, but it is of interest that "Modernus", who hits hard against legal history, did not quote from a very learned real property lawyer whose work was not packed with the most modern authorities. Challis, *Real Property*, 3rd ed., p. 431, wrote: "Historical inquiry into the origin of the law is a subject of which I can readily understand the fascination. To style it profoundly interesting is to use inadequate language. But I think that this subject should be kept quite apart from the law as it is administered in practice. There may possibly be some points on which historical research not only can throw light, but

can throw such a light as might reasonably appear, to men conversant with the administration of practical affairs, to afford a sufficient ground for judgments and opinions touching the decision of rights of property at the present day. But in my opinion these points are at least not numerous. I do not think, for example, that any Court, in deciding questions on the nature of customary freeholds, ought to pay any attention to arguments about *socmanni* and *liberi tenentes*, and so forth. Nor do I think it permissible, unless under the most extraordinary circumstances, to cite in Court any authority older than Littleton. The most profound real property lawyer now living holds this opinion so strongly, that he once even apologised to the Court of Appeal for citing Fitzherbert's *Natura Brevium*, because, though late enough in date, it is too unfamiliar to be properly intelligible except to people of unusual research; and he was afterwards so kind as to explain to me why, under the peculiar circumstances, he thought himself justified in citing that particular passage".

It speaks volumes for both the strides in historical knowledge and for the regress in real property learning that a learned author who commonly cites no other authority for a proposition than Co. Litt., Prest. Est., Cruise Dig. or Shep. T., should disapprove of the citation of the *Natura Brevium* on the ground of its unfamiliarity. We have some doubt whether to-day Co. Litt. could be regarded as much more intelligible than Fitzherbert—or would it not be better to say that Fitzherbert would not seem much less unintelligible.

But another commentary on these articles has also appeared in the form of the judgment of Mr. Justice Birkett in *Constantine* v. *Imperial Hotels*, [1944] 2 A. E. R. 171. In this case an action was brought against an innkeeper for refusing to take in a *bona fide* traveller and no damage was proved. The question arose whether or not action would lie. For this purpose the learned Judge discussed the origins and character of the action on the case. Indeed, it is difficult to see by what other method he could have arrived at a decision. The principal authority on which his decision ultimately depended was decided in 1703.

And, indeed, "Modernus" has nearly given his whole case away when he writes: "One of my own difficulties, when reading works or articles dealing with legal history, has been to relate the past to the present. A notable exception is to be found in the late Sir William Holdsworth's *History of English Law*. In that respect his work, unlike that of many legal historians, is of considerable value to practical lawyers". What, indeed, this plea in confession and avoidance amounts to is that the study of legal history is useful enough to the practitioner, but either legal historians will not write the right kind of legal history or practitioners will not study enough of it to relate isolated articles on rather obscure topics to that general fountain of knowledge that joins the present with the past. We suspect that the fault may lie a little on both sides.

But to return to Challis we must enter a *caveat*. Challis was speaking essentially as a conservative real property lawyer. A lawyer who could continue to demand that a legal contingent remainder was not subject to perpetuities, because it had never been, and that a determinable fee could subsist because Co. Litt. said it did. And in 1898, apart from occasional startling novelties, such as the application of

perpetuities to legal contingent remainders, or the Settled Land Act, 1882, which gave effect to conveyancing practice, the land law had become a branch of learning subtle and refined, but, to the initiated, so complete that to go back to history and find new propositions was almost an offence. This was not, and is not, so with the law of tort. Here, most of the fundamental problems remain unsolved, and without the aid of history the results are likely to be much more unharmonious even than has otherwise resulted.

The function of history in the Land Law, where it has always been most recognised, is primarily to explain and make intelligible the rules which now govern the subject. Secondarily, but not less importantly, it enables the practitioner properly to read the earlier reports which form the basis of such authorities as Fearne on Contingent Remainders. Thirdly, a proper appreciation of history may also put a line of authority in true perspective and give due weight to particular decisions. Nor must it be forgotten that part of the Land Law is intimately connected with the law of tort. So, for example, the law of easements is, in fact, dependent upon one branch of the law of nuisance, and the Court of Appeal not long ago had to consider whether an interference with a profit was actionable without proof of damage: *Nicholls* v. *Ely Beet Sugar Co.* Most text-books on tort state that a nuisance can be defended by prescription. If this is an accurate statement, the statement that easements can only be created in circumstances of such certainty, etc., that they can be granted by deed appears to be erroneous. As far as we know history does not supply the answer to this problem, but it should aid its solution should the question come before the Court.

Perhaps "Modernus" would say that we are not supporting the study of legal history as such, which, indeed, we did not set out to do, but only emphasising that some decisions and text-books in fact form part of our modern law, though, indeed, they came into existence a very long time ago. This may be true. Probably this, as so many such arguments, demands first that the cause of argument should be adequately defined. When does a study of law become a study of legal history?

Appointments of New Trustees.—We print below a letter received from a correspondent.

"We refer to the article on Appointments of New Trustees of Land in the issue of *The Conveyancer* of June, 1944.

As this subject is one which causes solicitors a good deal of trouble, we are taking the liberty of mentioning one or two points arising out of your article in connection with the appointment of trustees of land held on trust for sale.

(A) On page 217 your contributor, referring to the necessity for separate deeds of appointment under section 35 (1) of the Trustee Act, writes, 'There is nothing in the section which protects a purchaser from seeing that the trustees are in fact the same notwithstanding that a purchaser is not concerned with the trusts of the proceeds of sale: Law of Property Act, 1925, s. 2 (1). Nor is there any provision covering the results of failure to have separate instruments, but presumably again a purchaser is concerned to see that such instruments exist'.

With great respect, does not the passage quoted overlook the concluding words in section 24 (1) of the Law of Property Act, 1925—'but the purchaser shall not be concerned to see whether the proper persons are appointed to be trustees of the conveyance of the land'?

(B) Is it not arguable that a purchaser of land held on trust for sale is not concerned with appointments of trustees of the proceeds of sale at all for the following reasons? :—

(a) The underlying principle and purpose of the 1925 Legislation was to keep all matters affecting the proceeds of land held on trust for sale off the title to the land;

(b) The purpose of section 35 of the Trustee Act in prescribing separate deeds of appointment of new trustees of the conveyance on trust for sale and of new trustees of the proceeds of sale was to give practical effect to the principle mentioned in the preceding paragraph by ensuring that a purchaser's solicitors should not in fact see any appointment of trustees of the proceeds of sale when he inspected an appointment of trustees of the conveyance on trust for sale;

(c) If a purchaser is not concerned to see that the proper persons are appointed trustees of the conveyance of the land (Law of Property Act, s. 24 (1)) then there can be no object in his concerning himself with the appointment of trustees of the proceeds of sale at all.

(C) Referring to the omission of a proper endorsement of a memorandum under section 35 (3) of the Trustee Act, your contributor writes: 'In default of a decision it must be assumed that there is a defect in the title. This defect will, presumably, be serious if the appointment of new trustees relies for the vesting of the legal estate on the implied vesting declaration: Trustee Act, 1925, s. 40'.

Assuming that the absence of a memorandum created a flaw in the title, would it not invalidate the receipt for capital money as well as the vesting declaration?

(D) Your contributor points out that the endorsement is frequently overlooked. We agree; but with the greatest respect are there not some grounds for regarding section 35 (3) as regulating exclusively the domestic affairs of the trust as between the two sets of trustees? For example :—

(a) The concluding provision of the sub-section, which concerns the production of the conveyance by one set of trustees to the other, is clearly so confined;

(b) The memorandum must be endorsed 'By or on behalf' of the trustees of the proceeds, but the sub-section provides no means whereby a purchaser of the land could possibly verify the authority of the person making the endorsement or even (in the absence of a signature which is not required) his identity;

(c) If a purchaser of the land is bound to satisfy himself that section 35 (3) has been strictly complied with, then that sub-section merely nullifies the relief given to purchasers by section 24 (1) of the Law of Property Act;

(d) The statute does not, as your contributor points out, specify the consequences of non-compliance with the sub-section. This omission seems to us to be inconsistent with the view that a purchaser is intended to be affected by such non-compliance and consistent with the view that

the sub-section is merely a domestic affair as between the two sets of trustees.

A vesting assent on trust for sale normally declares who are the persons who have power to appoint new trustees. The reason for this given in *Prideaux*, vol. 3, at p. 661, is as follows :—

> 'If there is an express power to appoint new trustees for sale then this should be set out in the assent on trust for sale (see Trustee Act, 1925, s. 35), for to comply with that section separate deeds should be used when new trustees of the assent are appointed."

If a purchaser is concerned on an appointment of new trustees of a conveyance on trust for sale to see that there was at the same time a valid appointment of new trustees of the proceeds of sale, then the declaration about the power to appoint trustees in the vesting assent appears to serve no useful purpose.

(E) One further point on this troublesome topic : If the declaration in the vesting assent upon trust for sale that a named person is empowered to appoint new trustees is in fact wrong and an appointment of a new trustee is made in error by that person, is a purchaser from that new trustee in any way protected? If not, the declaration in the vesting assent seems to serve no useful purpose at all and to be no more than a potential trap for the unwary."

With regard to the first point of the letter, that a purchaser is not concerned with the requirement that the trustees of the land and of the proceeds of sale are the same, we are much obliged to our correspondent for pointing out an error in the note. Section 24 of the Law of Property Act, 1925, undoubtedly exempts a purchaser from seeing that the trustees are the same since he is not concerned to see that the proper persons are appointed trustees. It will be observed that the language is different; the persons appointed might not be the proper persons simply because the wrong persons were appointed trustees of the proceeds of sale, not because the same persons were not appointed trustees of both land and proceeds of sale. But on the construction of section 24 as a whole it seems clear that a purchaser is not concerned to see that the trustees were the same—a good illustration of the difficulties sometimes presented by this legislation where connected sections are sometimes even in different Acts.

Respecting the second point, namely, the necessity for seeing that there are two appointments, the points raised by our correspondent are valuable and instructive, but we doubt whether they could be weighed effectively against the express words of the statute. The purpose of the two separate deeds is, of course, primarily to comply with the same principle as that of the Settled Land Act, namely, that the documents of title to the legal estate should be quite independent of the documents of title to the beneficial interests. The advantages of this where the land is sold are obvious. It does not seem to us that keeping the trusts off the title involves the neglect of precautions to see that the title deeds relate only to the legal title. We think that, perhaps, a stronger reason for our correspondent's view that a purchaser cannot be compelled to see that two deeds exist is that to be found in the fact mentioned in the note itself, namely, that there is no penalty expressed in the Act for failure to do so. It might, therefore, be argued that the provision was

directory rather than compulsory. This is undoubtedly so, but the difficulty is whether in the absence of any decision a purchaser's solicitor is entitled to rely upon such an argument. In practice it may be necessary to do so to prevent undue expense or inconvenience, but we think that if it can be avoided it should be.

The third point, involving the memorandum of an appointment of new trustees, raises two issues, first, the effect of its absence on a receipt for capital moneys, and secondly, the real necessity for such a memorandum. So far as the former of these issues is concerned this depends essentially on the *effect* of the defect in title supposing such absence of a memorandum to create one. Obviously if the defect involves the appointment failing to operate as a vesting declaration the true trustees of the land are the old and not the new trustees. Whether or not this perfectly clearly expressed and peremptory direction contained in the statute will have this effect can only be decided by the Court. The failure to provide equally clearly and peremptorily the result of failure to comply with the direction is one of the lamentable peculiarities of statute law.

So far as the other issue is concerned we do not think that our correspondent correctly interprets the purpose of the provision. Its object seems to be to ensure that a record of the transmissions of the legal estate shall be kept on the principal document, again in conformity with the practice with regard to the legal estate in settled land. It has no relation to section 24 (1) of the Law of Property Act which, as far as it goes, is concerned to protect against an improper appointment of new trustees and not against transmission of the legal estate. Consequently, it is not concerned with the domestic affairs of the trustees as between two sets of trustees but with ensuring that the title to the legal estate is not overlooked by omitting a relevant title deed. In fact it seems to be part of the attempt made by the Settled Land Act and some other provisions to provide a legal title as nearly as possible traceable like a registered title under the Land Registration Act. In other words it is equivalent to the provisions for endorsing a memorandum of an assent on the probate but with this difference, the penalty or benefit of such endorsement is not stated.

The last point raised by our correspondent, namely, whether a purchaser is protected by the statement in an assent that X has the power of appointing a new trustee is probably the most difficult of all. The reason why this form is adopted is because it is in accordance with Form 9 of the Fifth Schedule to the Law of Property Act and a solicitor gets certain protection under section 182 of that Act. On the other hand, the statement does not appear to be protected by section 6 of the Administration of Estates Act, 1925, s. 36 (7), which protects a purchaser concerning the estate taken by the original grantee under the assent. Our view is that strictly a purchaser is concerned to see who has the power to appoint new trustees (if the title depends upon a new appointment), but if this is so the scheme of keeping the trusts of the proceeds of sale off the title by being contained in a separate document seems to be affected materially. Perhaps some other correspondent can suggest some other ground upon which a purchaser could claim protection?

We should like to conclude by thanking our correspondent for his

valuable letter and to say that we should like more of such letters, though it is hoped that it will not be possible to find errors for all correspondents to correct in our contributions. At the same time we would like also to say that the note itself was published primarily as a reminder to conveyancers not to leave things undone rather than to determine points that might arise on a contract for sale were they left undone. We think that conveyancers will agree with us that "it is better to be safe than sorry".

VALIDATION OF WAR-TIME LEASES ACT, 1944.

The decision of *Lace* v. *Chandler*, 113 L. J. K. B. 282, that a lease granted for the duration of the war did not create a valid term for that period has given rise to legislation to validate within limits such tenancy agreements. But this Act, in fact, goes further than the validation of certain war-time leases since it provides for certain other provisions in tenancy agreements.

AGREEMENTS TO WHICH APPLICABLE.

Whether the agreement was made before or after the passing of the Act it applies to a tenancy "for the duration of the war" (section 1 (1)), which means (section 1 (2)), whatever the actual words used, that upon the proper construction of the instrument the agreement shall end—

(i) with the end of the war or of hostilities as respects all the States at war;
(ii) with the end of the war or of hostilities with certain States;
(iii) with the end of the emergency under the Emergency Powers (Defence) Act or the regulations thereunder or under any other Act of the present Parliament;
(iv) with the end of the emergency (not defined with reference to any Act of Parliament) occasioned by the war or hostilities with any State or States;
(v) any event likely to occur on or in connection with any of the events aforesaid.

But the tenancy may also determine because—

(i) it is for a specified time or for the duration of the war whichever is the shorter;
(ii) it is for a specified time or for the duration of the war whichever is the longer;
(iii) the term shall continue until determined by notice, but such notice is not to be given until the end of the war.

And the "tenancy" includes an agreement between vendor and purchaser to retain the land for the duration of the war.

On the other hand the Act does *not* apply to a term for a specified period but subject to be determined by notice on the part of the landlord or tenant if the war ends before the expiration of that term. But the Act applies to agreements to which the Crown is a party: section 4.

Effect of the Agreement.

The effect of such an agreement is that, subject to what appears hereafter, it creates a term for ten years which can be determined by at least one month's notice in writing given after the end of the war as defined by the Act: section 1 (1). The notice can be given by either landlord or tenant: section 1 (1).

Where, however, the tenancy was created for a specified term, *e.g.*, twenty-one years, then the specified term takes the place of ten years. So, for example, an agreement for twenty-one years or the duration of the war, whichever is the shorter, means that if the war ends in, say, eleven years, the term will go on for twenty-one years unless it is earlier determined by one month's written notice: section 1 (4).

Furthermore, if the landlord had less than ten years of his own term to run at the date of the creation of the tenancy, then the length of his own term replaces the ten years prescribed by the Act: section 1 (4).

In place of the written notice prescribed by the Act any express provision in the tenancy agreement for determining the tenancy by notice either before the end of the war or after the end of the war shall be substituted for the statutory provision: section 1 (1). In the case of agricultural holdings the notice must comply with sections 23 and 25 of the Agricultural Holdings Act, 1923; that is, be given not less than a year nor more than two years before the tenancy is to be terminated: section 1 (1).

What is a War?

When the tenancy agreement uses for the purpose of defining the term *or for any other purpose* such expressions as "the war" or "hostilities" and the agreement does not indicate whether it refers to either (a) the war as respects all the States with which His Majesty is at war *and* all theatres of war, or (b) to the war as respects any particular State *or* theatre of war, the expression shall be construed as referring to the war as respects those States with which His Majesty was at war at the date when the agreement was made: section 2 (1). There is a proviso: "unless it is shown that the parties intended otherwise" and the Court is directly empowered to admit *any* evidence which may throw light on the intention of the parties. This sudden reversal of the English rules of evidence may be the shadow of future events.

Throughout these provisions there is also reference to "the emergency". No doubt this is because of the emergency legislation, but it is difficult to believe that wars should be confused with emergencies. After all, the Emergency Powers Act, 1920, expressly contemplates that its powers are primarily to be exercised in time of peace.

But the Act only applies to the "war" and "hostilities" at the time of the passing of the Act: section 7 (2). The Act was passed on August 3, 1944. However, we can hope that problems will not arise since it is for His Majesty to determine by Order in Council when a war or an emergency has ceased to exist anywhere and at any time: section 2 (2).

Matters Collateral to Duration.

It is provided that nothing in section 1, that is the section extending the term, shall affect any provision which does not relate to the duration of the tenancy: section 3 (3). Such provisions shall "continue to apply in relation to the tenancy as it takes effect under that section". We doubt the happiness of this phraseology. As the term was void obviously some of the provisions contained in any agreement may have also been avoided thereby. Such provisions cannot "continue" to apply, though we think it is obvious that they were intended to be incorporated in the agreement by this Act.

Cases to which Act does not Apply.

The Act does not apply:—

(a) where the tenancy has determined (otherwise than by notice) prior to the Act;
(b) if notice in writing was given before June 13, 1944;
(c) the parties have agreed before the passing of the Act to determine the tenancy or substitute another tenancy.

Nothing in section 1 shall be taken as requiring any agreement to be executed in writing or under seal.

PLANNING AND THE LAW OF INTERIM DEVELOPMENT.

By Desmond Heap, LL.M., L.M.T.P.I.,
Deputy Town Clerk of Leeds.

Interim development, as that expression is used in connection with planning matters, means any development taking place within the area covered by a proposed planning scheme between the date when the resolution of the planning authority to prepare a scheme receives the approval of the Minister of Town and Country Planning (or his predecessor, the Minister of Health, who relinquished all planning functions to the new Minister by virtue of the Minister of Town and Country Planning Act, 1943), and the date when the planning scheme comes into operation. Provision to this effect is found in section 10 (1) of the Town and Country Planning Act, 1932 (hereinafter referred to as "the 1932 Act") and it is important to note that by section 53 of the 1932 Act "development" includes, in this connection, not merely building or re-building operations but also *any change in the use* to which land or any building standing thereon is for the time being subject.

Extension of Interim Control.

The law concerning interim development, formerly to be found in section 10 of the 1932 Act and the Town and Country Planning (General Interim Development) Order, 1933 (hereinafter referred to as "the 1933 Order") has recently been modified in several important particulars and greatly widened in scope by the joint provisions of the Town

and Country Planning (Interim Development) Act, 1943 (hereinafter referred to as "the 1943 Act") and the Town and Country Planning (General Interim Development) Order, 1944 (hereinafter referred to as "the 1944 Order").

By section 1 of the 1943 Act all land in England and Wales which was not, on October 22, 1943, either the subject of an operative planning scheme or the subject of a resolution to prepare such a scheme came under interim development control, it being provided that such land should, as from that date, be *deemed to be the subject of a planning resolution* duly passed by a local authority and approved by the Minister of Town and Country Planning. This provision was very important because whilst rather more than 4 per cent. of the land in England and Wales was subject to full planning control under operative schemes and about 70 per cent. of such land had what may be termed interim development control, there remained, on October 22, 1943, approximately 26 per cent. of the surface of England and Wales which lacked any control whatsoever from a planning point of view by reason of the lack of appropriate planning resolutions. A large amount of this 26 per cent. of uncontrolled land was to be found in the centres of large cities, for these centres, being built-up areas, were not amenable to planning control prior to the 1932 Act. Even since the coming into operation of that Act many of them have not been made the subject of planning control for the simple reason that the planning authorities concerned have not seen fit to pass the necessary planning resolutions. Certain of these densely built-up centres of our large cities bear the scars of enemy action and therefore the need to have interim development control on the re-development of these central areas consequent upon enemy action has of late become more urgent than ever. Such control has been provided by the 1943 Act and there should now be no re-building of blitzed central areas on the principle of *laissez faire* as was greatly to be feared.

This bringing under interim development control of new and extensive areas of land has made the subject of interim development a matter of greater importance to those authorities whose duty it is to consider applications respecting such development, and a matter of very first-rate importance to the great number of landowners who, for the first time, have become affected by planning resolutions deemed to have been passed and duly approved and to have come into force on October 22, 1943. The law on the subject, by no means free from obscurities when contained solely in the 1932 Act and the 1933 Order, has acquired a much more complicated character by virtue of recent legislation and an endeavour is here made to unravel some of its intricacies by drawing together the relevant provisions of the 1932 Act, the 1943 Act and the 1944 Order.

The Securing of Compensation Rights.

The making of a planning scheme under the 1932 Act is a lengthy business, and in consequence the period of interim development which operates during the making of the scheme and while the scheme is before Parliament will be a matter of years rather than months. During this interim period individuals wishing to carry out development in the area of a proposed scheme will wish to proceed with their work but at the

same time will also wish to ensure that their development shall, as far as possible, be the subject of compensation if, when the planning scheme comes into operation, it is found that the particular form of development in which they have indulged contravenes the provisions of the scheme and has to be demolished or altered or prohibited in order to secure conformity with the scheme.

There is one way only of ensuring protection in such circumstances for interim development and that is by taking care that the development is undertaken in such a fashion or at such a time that it comes within the definition of "existing building", "existing work" or "existing use" set out in section 53 of the 1932 Act. The reason for this is that any interference with an "existing building" (which expression may be regarded as including an "existing work", for in this context precisely the same considerations apply to works as to buildings) or with an "existing use" by a responsible authority acting under section 13 of the 1932 Act is made the subject of compensation by section 18 (1) (b) of the 1932 Act to any party injuriously affected by such interference, whereas by section 20 (2) no such compensation is payable in the case of other buildings or other uses.

"Existing buildings" means, in this context and by virtue of section 53 of the 1932 Act, a building or a structure erected before the "material date" or even after such date provided in the latter case that it was either :—

(1) commenced before (though completed after) the material date; or

(2) entirely erected after the material date in pursuance of a contract made before such date; or

(3) erected in accordance with the terms of an interim development order or of permission granted thereunder.

By the same section "existing use" means :—

(1) a use of land or buildings for the same or similar purposes to those for which the land or buildings were used at the material date; or

(2) in the case of a new building which at the material date has not so far been used at all, the use for which it was designed; or

(3) the use of land for mining, quarrying, clay or gravel digging, or the depositing of refuse or the like purposes if the person so using the land was entitled so to do at the material date *and* at such date was, in fact, using neighbouring land for such purposes; or

(4) in any case a use permitted by or under an interim development order.

With regard, however, to (1) and (2) above in the definition of "existing use" it should be noted that if at any time after the material date the existing use of a building is discontinued for a period of eighteen months no subsequent use of that building (for whatever purpose) can be regarded as an existing use.

The expression "material date" used in the foregoing definitions means, by section 53 of the 1932 Act, the date when the resolution to prepare or adopt a scheme took effect (*i.e.*, received or, under the 1943 Act, is *deemed* to have received, the approval of the Minister under

section 6 of the 1932 Act) or such later date as may be fixed by the scheme itself.

If his development can be brought within the ambit of the definitions outlined above an individual will have the satisfaction of knowing that compensation will be payable if, when the planning scheme comes into operation, action affecting his development is taken under section 13 of the 1932 Act by the authority responsible for enforcing the scheme.

The Town and Country Planning (General Interim Development) Order, 1944.

Under section 10 (1) of the 1932 Act a general Order with respect to interim development was required to be made and the Minister of Health accordingly made the Town and Country Planning (General Interim Development) Order, 1933 (the 1933 Order) previously mentioned. This Order, containing the detailed provisions with respect to applications for, and grants of, consent to interim development, will be repealed on the coming into force of the Town and Country Planning (General Interim Development) Order, 1944, (the 1944 Order) shortly to be made by the Minister of Town and Country Planning under section 10 (1) of the 1932 Act and recently issued by the Minister in draft form. The 1944 Order also repeals any Special Interim Development Orders dealing with particular areas of land which may have been made under section 10 (1) of the 1932 Act.

The provisions of the draft 1944 Order compared with those of the 1933 Order are extremely intricate, yet the landowner embarking upon development (as defined above) after the commencement of the interim period (*i.e.*, after the coming into force of a planning resolution passed, or *deemed* to have been passed, by a planning authority) and thereby subjecting himself to all the liabilities and consequences provided for in the 1932 Act in connection with such development, must now make it his first business to obtain the consent under the 1944 Order of the appropriate Interim Development Authority to his proposed development. Such consent will not, however, be required if the proposed development is of the special kind referred to in the marginal notes and subheadings of the 1944 Order as "Permitted Development", *i.e.*, development permitted by the 1944 Order itself and in respect of which no application to an Interim Development Authority need be made. This matter of permitted development is dealt with later.

The 1944 Order is expected to come into operation shortly, and having regard to its involved and complicated provisions it is gratifying to note that, unless previously revoked, it will cease to have effect on the termination of the present period of national emergency, that is to say, on the date when the Emergency Powers (Defence) Act, 1939, expires. It is greatly to be hoped that when that time arrives the planning atmosphere will have so clarified itself that it will be possible for the Minister to make a new general interim development Order of a more straightforward nature and less hedged about with provisos and exceptions than is the present 1944 Order.

Interim Development Authorities.

By articles 2 and 3 of the 1944 Order the expression "Interim Development Authority" (to whom applications for consent to interim

development must be made) means the local authority which passes the resolution to prepare the scheme or which is *deemed*, under the 1943 Act, to have passed such resolution. But where such a resolution is passed by a county council or by a joint committee established under sections 3 or 4 of the 1932 Act the Interim Development Authority will be the council of the county borough or county district in which the land is situated. Where, however, land is, immediately before the coming into operation of the 1944 Order, subject to a special interim development order revoked by the 1944 Order, the Interim Development Authority will continue to be the same authority as that which granted consent under the special Order, but future consents by that authority will have to be granted under, and in accordance with, the provisions of the 1944 Order. The special provisions of article 15 of the 1944 Order apply as regards Interim Development Authorities within the administrative County of London.

Applications for Consent to Development.

By article 10 of the 1944 Order applications for consent must be made to the Interim Development Authority in writing accompanied by a site plan in triplicate to identify the land and such other particulars, plans and drawings in triplicate as are necessary to show the kind of development proposed. It is not, however, necessary to furnish more than the site plan in triplicate in a case where the application is in general terms and, if granted on the terms sought, would still be conditional on the *particulars* of the proposed development being subsequently approved by the authority.

An important provision is contained in article 11 affecting cases where the Interim Development Authority are at the same time the Authority under any local by-laws, regulations or Acts for approving the plans of new streets and buildings or are the Authority whose approval is required by statute or statutory order for the carrying out of works by statutory undertakers. In such cases any application made to the Authority *as By-law Authority* or *as Authority for approving the carrying out of works by statutory undertakers*, to approve plans for streets and buildings, or for the carrying out of works by statutory undertakers, as the case may be, is *deemed* to be an application made to the Authority *as Interim Development Authority* for consent under the 1944 Order to the development proposed, provided always that the application is accompanied by such particulars, plans and drawings as are required in the case of an application for consent made expressly under the 1944 Order.

Grants or Refusals of Consent.

By section 10 (3) of the 1932 Act the Interim Development Authority may, subject to the 1944 Order, grant the application unconditionally or subject to conditions, or may refuse it. (The remaining provisions of section 10 (3) of the 1932 Act have been repealed by the 1943 Act.)

Under article 12 of the 1944 Order the grant or the refusal of consent to interim development must be in writing and if conditions are attached to the grant, or if consent is refused, the reason for the attaching of conditions or for the refusal, as the case may be, must also

be stated in writing. An applicant who is aggrieved either by a complete refusal of consent or by a consent granted subject to conditions may, under section 10 (5) of the 1932 Act, appeal to the Minister of Town and Country Planning within twenty-eight days from the date when he received notification of the Interim Development Authority's decision or within such longer period as the Minister may allow. The Minister's decision on the appeal is final.

The reason for requiring conditional grants or refusals of consents to be in writing is clear. An applicant must know exactly where he stands so that he can frame his appeal to the Minister if he desires to make one. Even where consent is granted unconditionally it should, in order to comply with article 12 of the 1944 Order, be in writing, but as "writing", when that expression is used in an Act of Parliament, includes, by section 20 of the Interpretation Act, 1889, "printing . . . and other modes of representing . . . words in visible form" and as in the 1944 Order, article 2, it is provided that the Interpretation Act, 1889, is to apply to the interpretation of the Order as it would to an Act of Parliament, it is submitted that any practice of merely stamping plans with a rubber stamp as approved under the 1944 Order would not be incorrect in those cases where consent is granted unconditionally. In such cases it does not appear necessary that a formal instrument granting unconditional consent should be prepared.

Postponement of Application for Consent.

An Interim Development Authority, on receiving an application for consent to interim development, are not now bound to determine the same on receipt. Such an Authority, by section 2 (2) of the 1943 Act, may postpone either indefinitely or for a limited period consideration of the application unless the applicant is able to show that his proposed development would, if the application were granted, be carried out immediately. Against any such postponement an applicant has a right of appeal to a Court of summary jurisdiction. On such an appeal the only point for determination by the justices of the peace is whether or not the development, if allowed, would be carried out immediately and this is purely a question of fact. Thus, whilst the justices may drive an Interim Development Authority into giving a decision one way or the other on an interim development application, any appeal against that decision when given will still go, under the 1932 Act, to the Minister of Town and Country Planning, when the merits of the application from a planning point of view can be considered.

Under the 1932 Act an Interim Development Authority had to be particularly careful to remember that an interim development application was *deemed to be granted* unconditionally after a period of two months from the date of its receipt unless within that period the Authority dealt with it otherwise or obtained an extension of time by agreement in writing with the applicant. This state of affairs is now completely reversed by section 2 (3) of the 1943 Act under which an interim development application is to be *deemed to be refused* after the expiration of two months from the date of its receipt unless within that period it has been :—

(1) determined by the Interim Development Authority; or

(2) referred to the Minister of Town and Country Planning for decision by him as provided in section 6 of the 1943 Act; or

(3) formally postponed by notice in that behalf served on the applicant by the Interim Development Authority acting under section 2 (2) mentioned above of the 1943 Act.

At the expiration of two months *from the end of the period of postponement* stated in the notice of postponement, the application will be deemed to have been refused unless within that two months period the application has been dealt with by the Interim Development Authority or by the Minister of Town and Country Planning or a further postponement notice has been served. There seems to be no limit to the number of postponement notices which may be successively served, but against any one of them there is an appeal to a Court of summary jurisdiction as mentioned above. Moreover, under proviso (b) of section 2 (2) of the 1943 Act the Minister himself may intervene and require any particular interim development application to be determined and not postponed by the Interim Development Authority.

Temporary Consents.

It was formerly doubted whether one of the conditions subject to which consent to interim development could be granted was a condition limiting the period of time during which the development, of whatever kind it might be, was permitted to remain in being. Section 3 of the 1943 Act removes this doubt and makes it clear that an interim development consent *can* be granted so as to endure for a limited period only. This provision will be helpful in connection with areas which have suffered severely as the result of enemy bombing where temporary structures in the form of shops and the like may be urgently required to meet the needs of the inhabitants of the area. It is now clear that interim development consents to the erection of such temporary structures can be granted for limited periods only and there will be a right by the appropriate Authority to have such temporary structures removed at the end of that period without payment of any additional compensation.

Revocation and Modification of Consents.

Under section 4 of the 1943 Act where consent to interim development has once been given such consent may, at any time before the planning scheme comes into operation, be revoked or modified by the Interim Development Authority provided the consent of the Minister of Town and Country Planning is first obtained to any such action. Any such revocation or modification of consent will be carried out by means of a formal Order made by the Interim Development Authority with the consent of the Minister, who, before giving his consent, must hear any appeal which may be made to him by any person affected by the proposed Order.

An Interim Development Authority, however, must not make any order revoking or modifying its earlier consent except in a case where it appears to that Authority that, having regard to the provisions *then* proposed to be included in its planning scheme, the development for which it has already given its consent should not be carried out or com-

pleted, or should not be carried out or completed to the extent or in the manner allowed by the consent previously given.

Provision is made in section 7 of the 1943 Act for the payment of compensation by an Interim Development Authority in respect of the carrying out of work which is rendered abortive by any such Order as is mentioned above revoking or modifying a consent to interim development previously given by such Authority.

Enforcement of Interim Control.

A matter which has hitherto been a source of annoyance to Interim Development Authorities was the fact that during the interim period they could never take effective action against a person who indulged in interim development without first getting their consent so to do. In some instances where consent to interim development was applied for but was withheld by the Authority having regard to the provisions which it was proposed to insert in the planning scheme then in the course of preparation, a developer has been known to proceed with his development in defiance of the Interim Development Authority's decision. It was true, of course, that any such development could be drastically dealt with without payment of compensation when the planning scheme came into operation but, in the meantime, there was always the chance that the developer might be able to recoup himself out of his development and be in the independent position, when the scheme ultimately came into force, of not caring what action was taken with respect to his development.

Section 5 of the 1943 Act confers new powers on Interim Development Authorities who are now able, *during the currency of the interim period and before the planning scheme comes into operation and without payment of compensation,* to remove and pull down any building or work erected or carried out after July 22, 1943, otherwise than in accordance with the terms of the 1933 Order or the 1944 Order, or of consent granted under either of those Orders by an Interim Development Authority. Similarly, where the development consists of a change of use, after July 22, 1943, of land or buildings, such change of use may be prohibited by order of the Interim Development Authority who may, where necessary, have the land reinstated into its former condition.

Against the right of an Interim Development Authority to take the drastic action here mentioned a developer is given by this same section 5 of the 1943 Act a right of appeal to a Court of summary jurisdiction and the First Schedule to the Act gives details as to the procedure to be adopted on appeal. At the hearing of such an appeal it will be for the justices of the peace, sitting as a Court of summary jurisdiction, to consider whether the Interim Development Authority are entitled to take action under section 5 to enforce interim development control of the land in question. Thus, the point for consideration by the justices will be whether it is necessary or expedient, having regard to the provisions proposed to be included in the planning scheme then in course of preparation, for the Interim Development Authority to take the action indicated. The determination of this matter will obviously require a consideration of many fine points of planning and, accordingly, the advisability of providing that the appeal shall be heard by justices of the peace is to be doubted. This matter is quite different from the one

(already referred to) given over for determination by the justices by section 2 of the 1943 Act and which involves purely questions of fact. But section 5, in giving the appeal thereunder also to the justices rather than to the Minister of Town and Country Planning, follows the precedent set by section 13 of the 1932 Act, a precedent which has been deplored by many and on more than one occasion.

In addition to this right of appeal to the justices against action proposed to be taken by an Interim Development Authority under section 5 of the 1943 Act, the Minister of Town and Country Planning himself may, under the section, intervene and give directions to an Interim Development Authority controlling the exercise of their powers under the section.

The costs of an Interim Development Authority in taking action under section 5 of the 1943 Act may be recovered from the person responsible for the development in respect of which the action is taken and in a case where the development consists in a change of use of land or buildings, any person offending against the Order of the Interim Development Authority prohibiting such changed use is liable to a fine not exceeding fifty pounds and to a daily penalty not exceeding twenty pounds for every day on which the prohibited use is continued.

If consent to interim development has in fact been given, but for a limited period only, and that period expires before the planning scheme comes into operation, then action can be taken under section 5 of the 1943 Act by the Interim Development Authority as though such development had been carried out without interim consent at all. In such a case the action of the Authority will be directed against the person entitled, at the date the action is taken, to possession of the land in question.

Minister's New Power of Deciding Applications.

Under section 6 of the 1943 Act a new power is conferred on the Minister of Town and Country Planning which enables him where "it is expedient, having regard to considerations affecting the public interest", to have any application for consent to interim development referred by an Interim Development Authority for decision by himself. If the Minister exercises this power in respect of a particular interim development application or any class or description of such applications, it will mean that the control of interim development, so far as such applications are concerned, will be taken entirely out of the hands of the Interim Development Authority. Accordingly, it is provided in section 6 that before arrogating to himself the right to deal with an interim development application the Minister must allow the Interim Development Authority to appear before him and present any case which they care to make against the Minister's proposed action. This new power granted by the 1943 Act to the Minister of Town and Country Planning may be said to flow logically from the duty previously conferred upon the Minister by section 1 of the Minister of Town and Country Planning Act, 1943, of "securing consistency and continuity for the framing and execution of a national policy with respect to the use and development of land throughout England and Wales".

"PERMITTED DEVELOPMENT."

In granting or withholding consent to interim development an Interim Development Authority will primarily bear in mind the proposed provisions of the planning scheme which is in course of preparation but the Authority has not an entirely free hand in the matter. As was mentioned above, not every kind of development need be the subject of an application to an Interim Development Authority for consent under the 1944 Order. There are certain kinds of development, referred to in the marginal notes and subheadings of the 1944 Order as "Permitted Development", which, under article 4 of the 1944 Order, may be undertaken without the permission of any Interim Development Authority. It is in connection with this Permitted Development that the provisions of the 1944 Order become especially tortuous and it will be possible here to indicate only the outlines of these provisions, leaving more detailed information to be gleaned from the 1944 Order itself.

Under article 4 of the 1944 Order there are five classes of Permitted Development and they are as follows :—

Class I. Development authorised by any Act, or by any order approved by both Houses of Parliament, being an Act or order which specifically designates the land upon which the development may be carried out, except the erection, alteration or extension of buildings (including bridges and dams but not including any other structures or erections);

Class II. Development by a local authority or by statutory undertakers which has been sanctioned before the commencement of the 1944 Order by any government department;

Class III. The rebuilding, restoration or replacement of buildings and plant which have sustained war damage, except operations involving an increase in the cubic content of any building as it existed immediately before the occurrence of the damage, or a material alteration of the exterior of any such building;

Class IV. The carrying out of alterations to "existing buildings" (as specially defined in article 2 of the 1944 Order, the definition being, in effect, similar to that contained in section 53 of the 1932 Act dealt with above) and of operations required for the maintenance of existing buildings except alterations affecting the exterior of, or required in connection with an alteration of the use of, any building;

Class V. Development of any description specified in Part I of the Schedule to the 1944 Order dealing with development by :—

(a) railway undertakers;
(b) dock or harbour undertakers;
(c) canal or inland navigation undertakers;
(d) electricity, gas, water or hydraulic power undertakers;
(e) "mining undertakers" (as specially defined in article 2 of the 1944 Order);
(f) drainage authorities under the Land Drainage Act, 1930, or canal, inland navigation or water undertakers, the development being required in connection with the improvement, maintenance or repair of water courses or drainage works;

(g) sewerage authorities within the meaning of Part II of the Public Health Act, 1936, and

(h) the General Lighthouse Authority under the Merchant Shipping Act, 1894.

DIRECTIONS WITH RESPECT TO PERMITTED DEVELOPMENT.

If development falls within any of the above five classes then an Interim Development Authority has, in the first place, no control over it whatever, but by article 5 of the 1944 Order the Authority may, by a Direction made with the consent of the Minister of Town and Country Planning, exclude certain development (to be specified in the Direction) from the category of Permitted Development in any particular area specified in the Direction. If this course is adopted an Interim Development Authority will acquire control over development which was, in the first place, Permitted Development. But by article 5 the Interim Development Authority may only take such action in respect of a particular area when satisfied that it is expedient so to do " having regard to any proposals for the redevelopment of that area or to any other special circumstances affecting that area " and there are certain kinds of development (mentioned in the four provisos to article 5 (2)) falling respectively in Classes I, III, IV and V mentioned above in respect of which no Direction may be made by an Interim Development Authority and over which, accordingly, no power of interim development control whatsoever is available to the Authority.

Any Direction made under article 5 by an Interim Development Authority affecting Permitted Development must relate not to any particular application for consent to interim development but to *a particular area.* Under article 6, however, of the 1944 Order power is given both to the Minister of Town and Country Planning and also to Interim Development Authorities to exclude certain development from the category of Permitted Development in *a particular case.* But the Minister may only do this if the particular case of Permitted Development falls within the category of Class II (above) and an Interim Development Authority may only take this action if the Permitted Development falls within the category of Class III (above). The power conferred by article 6 will be exercised by means of a Direction issued by the Minister or the Interim Development Authority as the case may be and the right of an Interim Development Authority to issue a Direction is further restricted by provisos (a) and (b) of article 6 (2).

RESTRICTIONS ON REFUSAL OF CONSENTS AND IMPOSITION OF CONDITIONS.

Apart from restrictions on its freedom of decision imposed on an Interim Development Authority by the provisions with respect to Permitted Development contained in articles 4, 5 and 6 of the 1944 Order, there are further restrictions to be found in articles 7, 8 and 9 of the Order upon the right of an Authority to refuse consent to interim development or to impose conditions on the grant of such consent. These further restrictions apply to three kinds of interim development application and are as follows :—

(1) Applications relating to the erection or alteration or extension of buildings undertaken by persons having specific statutory powers in that behalf;

(2) Applications relating to the rebuilding, restoration or replacement of any building which has sustained war damage; and

(3) Applications relating to the erection, alteration or extension—

(a) by "mining undertakers" (as specially defined in article 2 of the 1944 Order) upon land comprised in their undertaking of any building required in connection with the winning, working, treatment or disposal of minerals; or

(b) by any person on a site in the immediate vicinity of a pithead of any building in respect of which a grant has been or is to be made out of the Miners' Welfare Fund constituted under section 20 of the Mining Industry Act, 1920.

If the development falls within any of these three categories then an Interim Development Authority may refuse its consent to the development, or grant such consent subject to conditions, only in the limited circumstances set out respectively in articles 7, 8 and 9 of the 1944 Order.

Discretionary Power of Interim Development Authorities.

Subject to what has been said with respect to Permitted Development and to the restrictions with respect to applications coming within the scope of items (1), (2) or (3) set out in the preceding paragraph, an Interim Development Authority when considering applications for consent to interim development are, after consultation with the Authorities and persons mentioned in article 13 of the 1944 Order, entitled to exercise their discretion and to treat each application according to its merits. The Authority must bear in mind the fact that their decision may be the subject of an appeal (under section 10 (5) of the 1932 Act) to the Minister of Town and Country Planning by an aggrieved applicant and must, nowadays, also remember the new power (already referred to) conferred by section 6 of the 1943 Act on the Minister of Town and Country Planning of requiring an interim development application to be referred for decision by him in lieu of being determined by the Interim Development Authority themselves.

The problem of interim development is an involved one. There is, on the one hand, the developer ready and willing to proceed with his proposed development, yet unable to do so freely and without restraint by reason of the fact that a planning scheme is in course of preparation. On the other hand there is the Interim Development Authority (generally the planning authority actually preparing the scheme) to whom he makes his application for consent to development. The Authority, saddled perhaps with a scheme in its early stages and with its provisions but vaguely formulated, may well find themselves in a difficult position when having to decide definitely whether the application should be granted or refused or postponed. The Authority will, no doubt, be mindful of the fact that every time such consent is granted a contingent liability for the subsequent payment of compensation is thereby incurred on behalf of the authority which, when the scheme

ultimately comes into operation, will become the authority responsible for enforcing the scheme. Yet, as the proposed provisions of the scheme may not as yet be clearly formulated, the Authority may find themselves with no real excuse for refusing their consent. In cases of doubt such as this guidance was given as long ago as 1923 in the Ministry of Health Circular 368 (dated January 29, 1923) in which it was stated that the presumption should always be in favour of the person seeking consent to interim development and that obstacles should not be placed in the way of such development except in the case where it is clearly detrimental to local needs or interests.

ASSENTS.

By MALCOLM M. LEWIS, M.A., LL.B., of the Middle Temple, Barrister-at-Law.

Prior to the Land Transfer Act, 1897, the doctrine of assent was confined to personalty because realty passed, on the death of a tenant in fee simple, directly to his devisee or heir-at-law who might enter without the assent of the personal representative. But since an executor was answerable at law to creditors to the extent of the assets which came into his hands it became established that no legatee, whether specific or pecuniary (including a legatee of chattels real), was entitled to take possession of his legacy unless and until he had obtained the executor's assent (*a*). An assent operated to perfect the legatee's title, who might thereafter recover the subject-matter of the legacy in an action at law against any persons, including the personal representatives, who might have possession of it (*b*). No particular form of assent was required; it might be in writing or by parol, or it might be implied from any expression or act on the part of the executor clearly indicating his consent to the legatee taking possession of the property bequeathed to him (*c*). The assent was not a matter of law but a question of fact for the jury (*d*). Moreover, where there were several personal representatives the assent of one or more to a bequest of personalty was sufficient and this was so even where the personal representative giving the assent was himself the legatee affected (*e*).

The doctrine of assent applied to residuary gifts of personalty and an executor might assent to part of a residuary gift, without assenting to the whole (*f*). But the doctrine had no application in the case of an intestacy. As assent once given was irrevocable the personal representative could not thereafter recover the property from the legatee, unless a deficiency of assets was subsequently created as a result of the discovery of liabilities of the testator which were unknown when the

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(*a*) Went. Off. Ex. (14th ed.), pp. 67, 68, 408. See Co. Litt. iii a; *Lampet's Case*, 10 Rep. 52 b. *Mead* v. *Lord Orrery*, 3 Atk. 239.

(*b*) *Bastard* v. *Stukely* (1677), 2 Lev. 209; *Cole* v. *Miles*, 10 Hoare 179.

(*c*) *Doe* d. *Mabberley* v. *Mabberley* (1833), 6 C. & P. 126; *Wise* v. *Whitburn*, [1924] 1 Ch. 460.

(*d*) *Mason* v. *Farnell* (1844), 12 M. & W. 674.

(*e*) *Townson* v. *Tickell* (1819), 3 B. & Ald. 31; *Coles* v. *Miles* (1852), *supra*.

(*f*) *Austin* v. *Beddoe*, 41 W. R. 619.

assent was given (*g*). But, notwithstanding an assent, creditors of the testator would generally be entitled to follow the assets into the hands of the legatee provided that the property claimed as assets was capable of being identified as acquired with or shown to represent the original assets (*h*). But the right to follow assets, being a purely equitable right, was not enforceable in any case in which the position of the parties had become so changed that it would be inequitable to enforce it. And where, after an assent to a bequest of leaseholds, the property was sold by the legatee to a *bona fide* purchaser, it was held that it was no longer liable to the claims of the creditors of the testator (*i*).

After the passing of the Land Transfer Act, 1897, real estate on death vested, in the first instance, in the personal representatives of the deceased notwithstanding any contrary disposition in his will, and section 3 (1) of the Act accordingly provided that " at any time after the death of the owner of any land his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee or otherwise, and may make the assent or conveyance either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge ". The Act did not, however, prescribe any form of assent which might accordingly be in writing or by parol, or implied from conduct, such as allowing the devisee to enter into receipt of the rents and profits. But under the wording of section 3 (1) an assent was inappropriate in the case of an intestacy and it was necessary for the administrator to convey the property to the heir-at-law.

In cases where title could pass by an assent it would appear that an assent could be given before probate, and even if the executor died without obtaining probate the validity of the assent was not impaired (*k*). But where such an assent was given there would, until the will was proved, be a flaw in the title of the devisee because there would be no legal evidence that the person purporting to give the assent had any power to do so.

In view of section 2 (2) of the Land Transfer Act, 1897, which provided that " it shall not be lawful for some or one only of several joint personal representatives without the authority of the Court, to sell or transfer real estate ", it seems clear that the concurrence of all the personal representatives was necessary for an assent to a devise as distinct from a bequest of personalty (including leaseholds).

The disadvantage of the rule that an assent, whether to a bequest or to a devise, need not be express but could be implied from conduct is exemplified by the case of *Wise* v. *Whitburn* (*l*). In that case the executors of a testator sold and assigned to a purchaser a leasehold property which the testator had bequeathed on trust, and it was held that as the executors had, prior to the sale, impliedly assented to the bequest by allowing the life tenant to enter into possession of the premises they had ceased to be in a position to make title as personal representatives and were liable to the purchaser under the implied covenant for title.

(*g*) *Noel* v. *Robinson*, 1 Vern. 90.
(*h*) *Blake* v. *Gale*, 32 Ch. D. 571.
(*i*) *Chamberlain* v. *Chamberlain*, 1 Ch. Cas. 257.
(*k*) *Fenton* v. *Clegg* (1854), 9 Exch. 680.
(*l*) [1924] 1 Ch. 460.

The alterations made in the law relating to assents by section 36 of the Administration of Estates Act, 1925, are confined to assents relating to real estate which by virtue of section 3 (1) of the Act includes " chattels real, and land in possession, remainder, or reversion, and every interest in or over land to which a deceased person was entitled at the time of his death ". Accordingly the section makes no change in the law relating to assents to bequests of pure personalty. By section 36 (1) of the Act a personal representative may assent to the vesting in any person who (whether by devise, bequest, devolution, appropriation or otherwise) may be entitled thereto, either beneficially or as a trustee or personal representative, of any estate or interest in real estate to which the testator was entitled or over which he exercised a general power of appointment by his will, including the statutory power to dispose of entailed interests, and which devolved upon the personal representative. This sub-section is widely drawn and would authorise the personal representative to give an assent even in the case of an intestacy. A case for such an assent might arise where there is only one person entitled under the intestacy and such person requires the personal representative to sign an assent in his favour, or where, in pursuance of the power of appropriation conferred by section 41 of the Act, realty is appropriated to a surviving spouse in satisfaction of his or her £1,000 charged on the residuary estate, or appropriated to one of several persons entitled to the residuary estate in total or partial satisfaction of his share therein. Moreover, if a devisee, before an assent had been signed in his favour, were to sell and convey his equitable interest to a purchaser, it would appear that the executor could properly sign an assent in favour of the purchaser so as to vest in him the legal estate. By section 36 (4) of the Act it is provided that " an assent to the vesting of a legal estate shall be in writing, signed by the personal representative, and shall name the person in whose favour it is given and shall operate to vest in that person the legal estate to which it relates; and an assent not in writing or not in favour of a named person shall not be effective to pass a legal estate ". It is to be noted that this sub-section merely deals with the vesting of a legal estate; the assent to the vesting of an equitable interest need not be in writing but may be made by parol or implied from conduct. Accordingly, if T dies, having by his will appointed X to be his executor and having devised Blackacre to A, and A dies before an assent is signed in his favour having appointed Y to be his executor and having devised Blackacre to B, X on being satisfied that Y has expressly or impliedly assented to the devise in favour of B could safely sign an assent in favour of B and it would not be necessary or appropriate for Y to join in the assent.

The real case of difficulty under the sub-section is in respect of an assent by a personal representative who is also a devisee. Is an assent in writing necessary? This question has been much discussed amongst conveyancers, but the prevailing opinion appears to be that in such a case the legal estate does not " pass " within the meaning of the sub-section and accordingly an assent can be implied from conduct.

It would follow that if, in such a case, the executor-beneficiary died intestate a purchaser would probably be safe in taking title from his administrators on the strength of a statutory declaration that an assent

had, in fact, been given. Some support for this view is found in the decision in *Re Hodge* (*m*). The facts were that a testatrix who died in 1934 appointed her husband to be the executor and devised certain freehold property to him in consideration of his paying her sister £2 a week during her life and directed that if he should dispose of the property he should in lieu thereof invest £2,000 for her benefit and that of her children. The husband proved the will in October, 1934, and as the rents of the property were not sufficient to provide £2 a week he made up the deficiency out of his own pocket. He never signed any assent in his own favour and in 1939 the property was sold. Farwell, J., held that the will created a personal obligation on the husband which was binding on him if he accepted the devise; that he had in fact accepted the devise and that the absence of a written assent was immaterial. "No doubt under the Act if a vendor is selling as beneficial owner taking under a will, the purchaser is entitled to require a written assent in order that he may be satisfied as to the title, and the Act gives him a right to demand it, but in a case of this sort the position is not the same. The legal estate in the property is vested in the plaintiff as legal personal representative and there is no difficulty with regard to that. His equitable interest as devisee depends upon equities and upon whether or not he has done acts which must be treated as amounting to sufficient evidence of assent so as to make it impossible for him now to say that he has never accepted this gift" (*n*). The reference to a vendor selling as beneficial owner in the above quoted paragraph is somewhat obscure and it is difficult to determine whether Farwell, J., was of opinion that if an executor-beneficiary sells as beneficial owner the purchaser would be entitled to call for an assent in writing. Obviously an assent in writing is desirable because it keeps the equities off the title and it is to be regretted that section 36 (4) of the Administration of Estates Act, 1925, is so worded as to make it possible to argue that an assent in writing is not necessary where the executor is also the devisee.

The effect of section 36 (5), entitling a person in whose favour an assent or conveyance of a legal estate is made to require that notice of the assent or conveyance be endorsed on the probate or letters of administration, is that a purchaser can now require the vendor to give the usual statutory acknowledgment in respect of a probate or letters of administration: *Re Miller and Pickersgill's Contract* (*o*).

Sub-sections (6) and (7) of section 36 of the Administration of Estates Act deal with rules of evidence relating to assents.

Sub-section (6) provides as follows: "A statement in writing by a personal representative that he has not given or made an assent or conveyance in respect of a legal estate, shall, in favour of a purchaser, but without prejudice to any previous disposition made in favour of another purchaser deriving title mediately or immediately under the personal representative, be sufficient evidence that an assent or conveyance has not been given or made in respect of the legal estate to which the statement relates, unless notice of a previous assent or conveyance affecting that estate has been placed on or annexed to the probate or administration.

(*m*) [1940] 2 Ch. 260.
(*n*) *Ibid.*, at p. 264.
(*o*) [1931] 1 Ch. 511.

A conveyance by a personal representative of a legal estate to a purchaser accepted on the faith of such a statement shall (without prejudice as aforesaid and unless notice of a previous assent or conveyance affecting that estate has been placed on or annexed to the probate or administration) operate to transfer or create the legal estate expressed to be conveyed in like manner as if no previous assent or conveyance had been made by the personal representative.

A personal representative making a false statement, in regard to any such matter, shall be liable in like manner as if the statement had been contained in a statutory declaration ".

It follows that, unless a beneficiary under a will, in whose favour an assent or conveyance is given or made, procures a notice of the assent or conveyance to be endorsed on the probate or letters of administration, his interest is liable to be overreached by a subsequent conveyance of the same property by the personal representative to a purchaser. But a purchaser from such a beneficiary would be protected even if the notice had not been so endorsed; similarly a purchaser from the personal representative need not, in order to be protected, have notice of the conveyance endorsed on the probate or letters of administration although it is appropriate to have such an endorsement made.

Sub-section (7) protects a purchaser by providing in effect that an assent by a personal representative in respect of a legal estate shall, in favour of a purchaser, unless notice of a previous assent or conveyance has been endorsed on the probate, be taken as sufficient evidence that the person in whose favour the assent is given is the person entitled to have the legal estate conveyed to him, and upon the proper trusts if any. It was held by Bennett, J., in *Re Duce and Boots, Ltd., Contract* (*p*), that the words " sufficient evidence " in the sub-section do not mean the same thing as " conclusive evidence " and that the meaning of the sub-section is that " a purchaser may safely accept an assent as evidence that the person in whose favour it was given was the person entitled to have the legal estate conveyed to him unless and until, on a proper investigation of title, facts come to the purchaser's knowledge which indicate the contrary ".

In considering the effect of this decision it should be borne in mind that the facts of the case were that the assent itself recited the terms of the will in such a way as to show that a person other than the person in whose favour the assent was given was the tenant for life of the property in question, and other documents affecting equitable interests were included in the abstract of title but not any documents effecting a release by the tenant for life of her life interest. In the circumstances it was held that a good title had not been shown. It is submitted in spite of this decision that it is no part of a proper investigation of title to examine the terms of the will of a testator who died after 1925 where the abstract shows a probate followed by an assent without recitals; to that extent the provisions of the sub-section operate as a curtain, and this is so although a copy of the will is, of course, annexed to the probate which the purchaser will inspect, so that by turning over the page he might discover facts which would *prima facie* suggest that the person in whose favour the assent was given was not

(*p*) [1937] 1 Ch. 642.

entitled to have the legal estate conveyed to him (*q*). In this respect it is worthy of note that in the case of a vesting assent made to give effect to a settlement, the Legislature has gone further in protecting a purchaser, because section 110 (2) of the Settled Land Act, 1925, provides that in such a case a purchaser of a legal estate in the settled land is "bound and entitled to assume (*inter alia*) that the person in whom the land is vested is the tenant for life or statutory owner". Moreover, by section 110 (5) of the same Act if an assent relating to land formerly subject to a vesting instrument does not state who are the trustees of the settlement a purchaser of a legal estate shall be bound and entitled to act on the assumption that the person in whom the land was thereby vested was entitled to the land free from all limitations, powers and charges taking effect under that settlement absolutely and beneficially, or if so expressed in the assent as personal representative or trustees for sale or otherwise and that every statement of fact in such assent is correct.

The giving of an assent by a personal representative does not, except in favour of a purchaser of a legal estate, prejudice the right of the personal representative to recover the estate or interest to which the assent relates or to be indemnified out of such estate or interest against any duties, debt or liability to which such estate or interest would have been subject if no assent had been given (*r*).

Finally, section 36 (10) of the Act empowers a personal representative, as a condition of giving an assent, to require security for the discharge of any duties, debts or liability, but the existence of such duties, debts or liability does not entitle him to postpone the giving of an assent if reasonable arrangements have been made for their discharge.

CURRENT PRACTICE IN HOTCHPOT VALUATION.

By Bertram B. Benas, B.A., LL.B., of the Middle Temple, Barrister-at-Law.

In former numbers of *The Conveyancer* (Vol. 6, N. S. 181, 228) the subject of Hotchpot was surveyed by the present writer in relation to its origin and development and the article concluded with a review of some of the leading cases. These cases now require to be supplemented by a consideration of the most recent decision which has effected a revaluation of hotchpot values. The determination of the date when the residuary estate of a testator should be valued for the purpose of adjusting the rights of the parties *inter se* in respect of a hotchpot clause came up for consideration and was the subject of a decisive judgment in *Re Hillas-Drake, National Provincial Bank, Ltd.* v. *Liddell*, [1944] 1 A. E. R. 375 (noted *ante*, p. 233). In this case a testator by his will devised and bequeathed all his estate to trustees upon trust for sale and conversion and directed that the whole of his trust fund,

(*q*) See J. M. L., "The Curtain", in the Law Journal, December 11 1943, p. 395.
(*r*) S. 36 (9) of the Administration of Estates Act, 1925.

after the payment of certain annuities and subject to his wife's life interest, should be held in trust for his three children in equal shares. He further directed that certain money settled on his children should be brought into hotchpot. The Court was asked to decide (a) the date at which the distributable assets of the estate ought to be valued for the purpose of the hotchpot clause, and (b) the manner in which the rights of beneficiaries in the income of the estate up to the date of distribution ought to be adjusted. Simonds, J., as he then was, held, (a) that the rights of advanced and unadvanced beneficiaries should be adjusted by reference to the value of the estate at the date of distribution, and (b) that the share of residuary income distributable to advanced beneficiaries must be debited with interest at 4 per cent. per annum less tax on the amount of the advances brought into hotchpot by them. His Lordship in express terms did not follow the judgments in *Re Gunther's Will Trusts, Alexander* v. *Gunther*, [1939] Ch. 985, a decision of Farwell, J., which was followed by Bennett, J., in *Re Oram, Oram* v. *Oram*, [1940] Ch. 1001.

Simonds, J., in the course of his judgment showed (p. 376) that the questions raised in the case were logically interconnected. Recourse to the method commonly adopted whereby the advanced beneficiary should bring into hotchpot on income account 4 per cent. per annum on the amount of his advances and be debited therewith against his share of income would not be a necessary procedure if the assets of the testator were to be valued at his death for the purposes of hotchpot so that the fractional share of each beneficiary in the ultimately distributable estate was finally determined on that footing. The fact that the method first referred to was general in the practice of administration both in and out of Court was of great importance in considering the proper date for valuation. At a later stage of the judgment, his Lordship expressed the view (p. 377) that although, perhaps, it was a practical possibility to continue a distribution of capital upon the basis of a valuation of assets at the death with a distribution of income upon the footing that the advanced beneficiary was charged with interest upon his advances, yet the combination was utterly illogical and unscientific and it was a fair conclusion that such a method of dealing with income was devised just because capital was distributable not upon the basis of a valuation made at the death, but upon the actual value at the date of distribution. He proceeded to refer to *Re Wills, Dulverton* v. *Macleod*, [1939] Ch. 705, one of his own decisions in relation to a will in which he had shown that for at least a century that had been the common method of dealing with income in the absence of any contrary direction. In that case his Lordship held that advances made to the beneficiaries should be charged with interest at 4 per cent., the amount of such advances being determined by the value of the settled securities as at the date of settlements made *inter vivos* in favour of the beneficiaries. Referring to Seton's *Judgments and Orders* (7th ed., Vol. I, p. 212, and Vol. II, p. 1436) the learned Judge said that numerous examples were to be found of orders therein based, as regards valuation for hotchpot, upon the value of the estate at the date of distribution, but that he had not found any order in which the Court had directed the valuation as at the death of a fractional distribution based on that valuation. His Lordship said (at pp. 376–377) that in a matter of this kind it is very relevant to consider

what has been the practice of the Court and referred to the views of Counsel of experience, the Chief Registrar, and the Chief Master, who all held that the practice had been in accord with what appeared to be the principle and that the relevant date had always been, in the absence of a special provision, the date of distribution. This reference, and deference, to practice of the Courts in such matters, calls to mind the similar judicial attitude to the practice of conveyancers. The Registrars and the Masters have charge of the mechanics in the technique of the administration of trusts, testamentary and *inter vivos*, when once they become subject to the Court's jurisdiction, just as conveyancers are concerned with the mechanics of property law in its various extra-judicial spheres, and their respective practices have helped to consolidate the upbuilding of the substantive structure. The learned Judge himself observed (at p. 377) that "there can be no more cogent authority upon a question of this kind than the long practice of the Court. The law is implicit in the orders that the Court has made". It will be recalled that in *Re Gunther's Will Trusts* (*supra*) Farwell, J., regarded the established rule as being that the valuation should be made at the death of the testator (see further hereon "Hotchpot" by the present writer, *The Conveyancer*, N. S., Vol. 6, at p. 232). This decision was followed as above mentioned by Bennett, J., in *Re Oram, Oram* v. *Oram* (*supra*). In that case it was held that, in the absence of any directions in the will, it is a general rule of administration that where the testator's estate is distributable on his death, the proper date for the valuation of the estate for the purpose of distribution is the date of death. It may be, however, that where the provisions of the will are such that there must be an interval of time between death and distribution, if a valuation of the estate to be divided has to be made, it must be made not at the date of the death, but at the date of distribution. In *Re Hillas-Drake, National Provincial Bank, Ltd.* v. *Liddell* (*supra*), the learned Judge commented upon the last two cited cases as follows (at p. 377): ". . . in my opinion it is the judgment of *Re Gunther*, followed by Bennett, J., in *Re Oram*, which is out of line with authority, and is inconsistent with long-established principle and practice. I do not doubt, in deciding as I do, that the rights of beneficiaries advanced and unadvanced must be adjusted upon the basis of the value of distributable assets as at the date of distribution, I do but reaffirm the old practice of this Court and stand in the ancient way. Upon the second question, namely, the adjustment of rights in respect of income, I need not repeat what I said at length in *Re Wills* (*supra*) and have already indicated in this judgment. There being no provision to the contrary in the will, the advanced beneficiaries will be debited against their share of residuary income with interest at 4 per cent. per annum less tax on the amount of capital brought into hotchpot by them". If reference is made to the report of the judgment (at p. 376) it will be noted that his Lordship showed that if the date of the testator's death is taken as the proper date for valuation and the assets available for distribution are valued as at that date equality is not necessarily secured. It is almost certain that inequality will be obtained in greater or lesser degree. He proceeds to give an illustration in which, so far from equality being produced by that method of hotchpot, the advanced beneficiary lost in the distribution substantially more than he had gained by his advance-

ment. Conversely, if the assets had depreciated between the death and the date of distribution, that method of applying the hotchpot provision would allow the advanced beneficiary to retain a substantial advantage. Upon principle, there seemed no reason for adopting such a method.

For some time now there has been a conflict of decisions in relation to these questions, and as Mr. J. M. Lightwood observed in a learned review of these recent cases up to and including *Re Hillas-Drake* (*supra*) (94 Law Journal, pp. 155, 163, at the latter page), " So careful a judgment as that in *Re Wills* (*supra*) might well have been expected to put an end to discussion, but not so ". The later decision is a fortification of the earlier case by the ascertainment of the general and prevalent practice of the Court in administration as testified by those in charge of the framing and working out of the Court documents, and by the examination of the effect of other methods upon the fundamental principle of hotchpot. As illustration is a very helpful means of elucidating principle and practice, reference may be made to a most useful article in 63 *Law Notes*, pp. 101–103, in which the instances given by the learned Judge in *Re Hillas-Drake* (*supra*) are supplemented by many others with pithy comments and explanatory observations, greatly conducing to the further clarification of the various problems presented. It would, perhaps, be too much to expect that the last word has been spoken with regard to the methods of hotchpot valuation, remembering that the latest decision was that in a Court of first instance, before the learned Judge had been elevated to the highest tribunal. But the intrinsic force of the judgment should tend to stabilise the traditional practice, the equilibrium of which had been somewhat shaken by the divergent judgments above referred to. I would repeat my cautionary note in my previous articles on " Hotchpot " (*The Conveyancer*, N. S., Vol. 6, at p. 233) that the conveyancer is well advised to make assurance doubly sure by express directions, and, in addition to the reference to the formulæ in the *Conveyancers' Year Book* for 1940, there should be added a reference to a further clause by Sir Lancelot Elphinstone in the 1941 edition at pp. 197–198, and his observations upon *Re Oram* (*supra*) in the light of *Re Gunther* (*supra*) therein set forth anticipate the judgment in *Re Hillas-Drake* (*supra*) and support the views of the Chief Registrar and Chief Master, of which his Lordship in the latter case made express citation.

EDUCATIONAL PROPERTY AND THE EDUCATION ACT, 1944.

The new Education Act, with its 122 sections and nine schedules, is likely to provide a large number of people with a great deal of food for thought and the digestion will have to be very good not to suffer from overfeeding. Nevertheless, from the point of view of subscribers to this Journal there are certain sections which are particularly in point and possibly some may give rise to difficulties. We can begin by saying that the whole of the Education Act, 1921, is gone and that sections 1—5 and 108—122 take immediate effect, sections 6—69 and 76—107 take effect as from April 1, 1945, and the remaining

sections, 70—75, from such a date after April 1, 1945, as shall be established by Order in Council. We should like to meet the humorist in the " Ministry of Education " that decided that the most contentious of the provisions of the Act should take effect on All Fools Day.

Discontinuance of Voluntary Schools

Under section 13 it is contemplated that an education authority may wish either to maintain a voluntary school as a county school or cease to maintain it altogether. In either event it will be necessary, save as provided by section 14, to obtain the consent of the Minister of Education to the proposals for discontinuance. The Minister can only consent to taking over a voluntary school by the local authority if he has approved an agreement between the authority and the managers or governors " for the transfer to the authority of all necessary interests in the school premises " in accordance with Schedule II, para. 13 (4). Schedule II provides that the authority *may* make an agreement for the transfer to the authority of any interest in the school premises held by any persons for the purposes of any trust deed relating to the school (paragraph 1). The Minister can only approve such agreement if (a) due notice has been given to any persons other than the managers who, by virtue of any trust deed, have an interest and to any other persons appearing to the Minister to be concerned, and (b) the execution of the agreement *will effect the transfer* of all interests necessary for the purpose of enabling the authority to maintain the school as a county school (paragraph 3). Presumably the legal estate is not necessary since it does not apparently pass under such an agreement, because by paragraph 6 the managers may, whether or not the interest to be *transferred* to the authority by virtue of the agreement is vested in them, *convey* that interest to the authority. Quite why the Act speaks of conveying and transferring in the same sentence is not clear, but surely it must be clear enough that a separate instrument is intended to operate as the " conveyance ". But where any person has a right to the occupation or use of the school premises other than the managers or any part thereof for any particular purpose, no provision of any agreement shall affect that right unless he has consented thereto (paragraph 7). This seems to modify paragraph 6. If the interest of another party entitles him to " occupation or use " " for any particular purpose " this right will not be capable of being transferred under the agreement.

One query is whether a right of reverter vested in another party under the Schools Sites Act, 1841, could be destroyed by means of an agreement under this Schedule. But we shall have to revert to the Schools Sites Act again.

Section 14 then provides that the managers may not discontinue to carry on a voluntary school without serving at least two years' notice on the Minister and the Education Authority. What dire results will accrue to them if they do we have not yet discovered. If after notice the managers inform the authority that they cannot carry on the school on the ground of expense, then the authority has power to carry it on instead.

Where the Minister is satisfied that it is expedient that any county or voluntary school should be transferred to a new site (i) because it is

not reasonably practicable to make existing premises conform to required standards, or (ii) because of movement of population, or action under housing or town and country planning enactments, he may authorise a change of site. This authorisation is not to be deemed a discontinuance of the school *for the purposes of the Act*. On the other hand this section does not appear to deal with the right of reverter on premises granted under the School Sites Acts. The purpose of the provisions appear to be machinery to avoid the more cumbersome rules for establishing or discontinuing a school from taking effect. In connection with these changes it may be convenient to mention that the Minister of Education can approve plans for buildings in contravention of the Public Health Act, 1936, and any local Act or by-law (section 63).

Existing Endowments of Voluntary Schools.

As the new Act throws a considerably greater burden, in some respects, on the local authority with regard to voluntary schools, some income will not be required for the normal purposes of maintenance. Likewise other changes may affect endowments, and so the Act has some provision for dealing with superfluous trust funds. These provisions are very short and are as likely as any to concern the conveyancer.

The principal section, section 65, can be summarised as follows: Any income under a trust deed, which is to be applied to the maintenance of a school, shall not be paid to the local authority bound to maintain it, but shall be applied by the managers towards the discharge of their obligations, if any, with respect to maintenance of the school, or in such other manner, if any, as may be determined by a scheme for the administration of the endowment. Presumably, the scheme envisaged is one to be made under the Endowed Schools Acts, 1869—1908, where the scheme is drawn up by the Charity Commissioners but requires the consent of the Minister of Education (see 1874, section 6).

In section 86 (1) it is expressly provided that where an educational endowment includes the purpose of provision of denominational religious instruction in a voluntary school and it is desirable that a scheme should be drawn up under the Endowed Schools Acts in order to enable effective participation in such instruction and the Acts provide no adequate power to make such a scheme, the Minister shall have power to enable such scheme to be made. The period of one month is substituted for two months in connection with objections or petitions to the Privy Council under the old Acts (section 86 (4)). By section 67 (3) where any trust deed provides for a bishop "or any other ecclesiastical or denominational authority" deciding whether the religious instruction is in accordance with the trust deed, then this question shall be settled in accordance with the trust deed.

The provisions relating to the Schools Sites Act, 1841, which provides for a right of reverter if the land ceases to be used for a school: see *Dennis* v. *Malcolm*, [1934] 1 Ch. 244; *Re Cawston's Conveyance*, [1940] Ch. 27, may give rise to some difficulty. Section 86 (2) provides that where a scheme relating to educational endowments made under the Endowed Schools Acts *should* make

provision for the sale of a school but the Schools Sites Act prevents such a provision, the Minister may direct that the Act shall have effect in relation to the land. This, however, depends upon the Minister *being satisfied* either (a) that the person entitled to the benefit of the right of reverter cannot *after due inquiry* be found; or (b) if such person can be found then that he has consented and, if he has consented in return for the payment of a sum of money, that adequate provision can be made for the payment of the sum out of the proceeds of sale. Section 86 (3) enables a scheme made under the Endowed Schools Acts to make provision for a payment out of the proceeds of sale in consideration of the relinquishment of the right of reverter.

It will be observed that under this provision the Schools Sites Act remains in full force subject to the possibility of getting rid of the inconvenient cases where either no person can be found to enforce the right of reverter or the owner of the right of reverter consents. In fact these provisions are only conveyancing devices and are available only where a scheme is being made under the Endowed Schools Acts.

Local Authorities and Endowments of Schools.

Section 85 (1) provides that a local authority shall have power and shall be deemed always to have had power to " accept hold and administer *any* property upon trust for purposes connected with education ". But the generality of this provision is modified by two sections. Sub-section (3) provides that any school for primary or secondary education, not being a nursery school or special school, shall be a county school. Sub-section (2) requires the consent of the Minister of Education wherever the local authority is created trustee of any primary or secondary school other than a nursery school or a special school, and where proposals are submitted for his consent they shall be treated as proposals for the maintenance of a county school.

Voluntary schools are divided by the Act into three classes: (a) Controlled, (b) aided, and (c) special agreement schools. Controlled schools are those where the governors or managers are not responsible for the maintenance of the school; an aided school exists when the managers can put it into condition and pay repairs other than repairs to playgrounds and certain repairs to buildings, and special agreement schools fall into the same category. For our immediate purpose the importance of this classification is the use to which a local authority can put the school premises (section 22). If it is a " controlled " school, the managers can determine the use of the school premises on Saturday, *except* when required for the purposes of the school or for any purpose connected with education or with the welfare of the young, and on Sunday the *foundation* managers determine the use of the premises.

In the case of " aided " or " special " schools the local authority can demand free accommodation on not exceeding three weekdays a week for any purpose connected with education or with the welfare of the young *if* they are satisfied that there is no suitable alternative accommodation. The Act does not seem to provide any machinery for compelling a proper exercise of discretion so, presumably, this will be left to the general law governing local authorities. Where the trust deed of any school provides for some other person than the managers to have control of the

occupation and use of the premises, he is entitled to such use and occupation for the purpose of these provisions as a substitute for the managers.

ACQUISITION OF SCHOOL PROPERTY.

Section 117 of the Education Act, 1921, is, of course, repealed and a new section 87 has been substituted. This section is much more stringent in its terms than section 117. The Mortmain, etc., Acts, 1888—1892, have no operation on an assurance of land or of money to be laid out in the purchase of land if the land or the income thereof is to be used for educational purposes. "Educational purposes" have been pretty widely construed under the old Act and include schools other than education authority schools and have included the provision of a sanatorium for a public school: *Re Harrow School Governors*, [1927] 1 Ch. 556. Every "assurance" of land or of personal estate to be laid out in the purchase of land is to be void after April 1, 1945, unless it (or a copy thereof) has been sent to the Minister of Education within six months of the date of the assurance. The Minister has power to extend the time. The Minister is required to keep a record of every assurance or copy which is sent to him, but no provisions seem to be made for search or for proving to a purchaser that this provision has been complied with.

"Assurance" shall have the meaning assigned to it by section 10 of the Mortmain, etc., Act, 1888: section 87 (4). This section includes "devises bequests and every other assurance by deed will or other instrument". The Act does not say whether the devise or bequest shall be lodged after execution or after the death of the testator. It will be remembered that the devisee has not got the will and might have some difficulty in getting it, and it may be that the effect is to render any such devise or bequest wholly void: *Luckcraft* v. *Pridham* (1877), 6 Ch. D. 214. We think that this sub-section needs immediate amendment.

A local authority has power to acquire land compulsorily either within its area or outside by an order made by the authority and confirmed by the Minister: section 90. The provisions of the Local Government Act, 1933, concerning compulsory acquisition apply as if the Minister of Education were substituted for the Minister of Health.

The Minister must not confirm a compulsory order for a *voluntary* school *unless he is satisfied* that (i) the arrangements for vesting of the land, *and* (ii) the appropriation of the land for the purpose are such as to secure that the local authority shall not bear any expenses which under a non-compulsory purchase would have been borne by the managers: section 90 (1) proviso. The Minister of Education will also exercise the powers of the Minister of Health under the Local Government Act, 1933, s. 163, appropriation of land for purposes other than those for which acquired, and the Local Government Act, 1933, s. 165, sale, letting and exchange of land vested in local authorities so far as there is any land vested in the local authority for the purposes of the functions of the Minister of Education.

INDEPENDENT SCHOOLS.

The Act requires that when Part III comes into force (by Order in Council after April 1, 1945) all independent schools shall be registered,

though the Minister may exempt a school or class of schools from the requirement (section 70 (1) (2)). A person who conducts a school which is not registered is liable to a fine for the first offence and fine or imprisonment for a subsequent offence. The school when registered may be struck off the register (section 71), and a tribunal by way of appeal is set up which is presided over by a person who has " such legal qualifications as the Lord Chancellor considers suitable ". An independent school means any school at which full-time education is provided for five or more pupils of compulsory school age (whether or not such education is provided also for pupils under or over that age) not being a school maintained by a local education authority or a school in respect of which grants are made by the Minister to the proprietor of the school. As the provisions do not appear to be immediately applicable and not, perhaps, of much importance to conveyancers, we leave them at that, remarking that in a manner of speaking while all county schools will be " free " (of charge) (section 61), there will be no schools wholly " free " (of supervision) within the school age.

CONCURRENT INTERESTS IN LAND.

I.

The Vesting of the Legal Estate in Undivided Shares.

One of the more peculiar features of the Property Legislation of 1925 is that, although it makes many provisions about " undivided shares ", it nowhere defines what is meant by the expression. It is the more odd, because, although it appears once in the Settled Land Act, 1882, s. 2, it is not an expression to be found in the real property or conveyancing books to any extent prior to 1926. In Wharton's *Law Dictionary* and Osborn's *Law Dictionary* as well as Edwards' *Compendium of the Law of Property*, " undivided shares " were stated to include " joint tenancy ". Stroud's *Judicial Dictionary* refers only to the provisions of the Settled Land Act, 1882, and the *Encyclopædia of the Laws of England* (2nd ed.) contains no such heading. It has been generally understood to include tenancy in common but not joint tenancy for the purposes of the Act, but what other forms of concurrent interest are also included may be open to question. The subject, therefore, requires some consideration in itself, but it may be easier to explain some of the problems of defining an undivided share if we first examine the present rules for the vesting of the legal estate. If, therefore, we draw most of our illustrations from tenancies in common and use tenancy in common as if it were coincident with " undivided shares " it must not be taken to be assumed that this is the case. The Act treats all interests which fall within the expression " undivided share " for the purposes of the Act in the same manner.

In dealing with the vesting of the legal estate we propose as far as possible to proceed from the known to the unknown and to ignore, at this stage, the transitional provisions. It is only as the outlines of what may be called settled law is grasped that the essential problems emerge.

CONVEYANCE EXPRESSED TO BE IN UNDIVIDED SHARES.

Where land is expressed to be conveyed to any persons in undivided shares *and* those persons are of full age the conveyance shall (notwithstanding anything to the contrary in the Act) operate as if the grant had been made to the first four grantees as joint tenants upon the statutory trusts for sale: L. P. A., s. 34 (2). A conveyance is almost any form of assurance except a will or codicil, so that, apart from these two forms of document, an express grant to persons in undivided shares operates to create a joint tenancy at law. If the grant is to mortgagees then no statutory trust for sale will arise, although they will hold in like manner as if the mortgage money had belonged to them on a joint account: section 34 (2) proviso.

The restriction of the property vesting in the first four grantees, of course, follows the general run of provisions requiring that trustees shall be limited to four. The fact that other owners of undivided shares are thereby excluded from any real control of the land has had to be sacrificed to the simplicity of conveyancing. As joint tenants the death of any owner of the legal estate simply vests the entirety in the surviving trustees until, on the death of the last surviving trustee, it vests in the personal representatives of the last surviving trustee: Trustee Act, 1925, s. 18 (2). The personal representatives also have the power of appointing new trustees: Trustee Act, 1925, s. 36 (1), notwithstanding that there may be several persons who are entitled absolutely to undivided shares in the proceeds of sale. This is a practical recognition that there can be no such thing to-day as an "undivided share in land": Law of Property Act, 1925, s. 1 (6); s. 34 (1). The interest of the beneficial owner is in the proceeds of sale and, consequently, it follows that he is not essentially concerned with the persons in whom the legal estate is vested. This is one of the most revolutionary changes in the whole property legislation of 1925.

Section 34 (2) in terms only applies where land is *expressed* to be conveyed to persons *in undivided shares*. Presumably this would include, for example, a case where it is expressed to be conveyed to the grantees "as tenants in common", since they are thereby bound to hold in undivided shares, although they are not expressed to take "in undivided shares" but as "tenants in common". We are aware of no decision on this point. On the other hand it seems to be clear enough that as the provision stands and according to ordinary rules of interpretation the provision does not apply to cases in which the grantees are not *expressed* to take in undivided shares. Consequently, *prima facie*, this provision does not apply (a) to any grants made by will or codicil; (b) to any cases in which the land is granted to trustees for sale, the proceeds of sale being held in unequal shares; (c) to grants to persons to hold as joint tenants, when for certain reasons, *e.g.*, because the property is partnership property: *Re Fuller's Contract*, [1933] Ch. 652, the beneficial interest is held in undivided shares; and (d) where not all the persons named in the grant are of full age. The third of these points is particularly difficult and must be reserved for later consideration.

Where a devise is made in undivided shares the Act makes provision next hereafter to be considered, but no mention is made of the result

if the fee simple is conveyed to A and B as trustees for sale for themselves beneficially in equal shares. This is, of course, of importance, because in practice most of the precedents and, consequently, most conveyances take something of this form. Indeed, Mr. Lightwood suggests, as we understand him, that the intention of the Act was that undivided shares should be created, if at all, in this form and that section 34 (2) was only included in case by an oversight the trust for sale was omitted: see 73 L. J. News. p. 355. While in no wise wishing to combat Mr. Lightwood's view of what was the intention of the framers of the Acts, since that we are not privileged to know, we can only opine that any justification for such an opinion must come from section 36 (4) of the Settled Land Act, but whether or not this subsection does indicate that the creation of an express trust for sale is the normal method of creating undivided shares the result is different from the statutory trust for sale created by the Law of Property Act, 1925. For example, the rule that trustees for sale shall consult the beneficiaries so far as practicable and give effect to the wishes of the majority does not apply to an express trust for sale unless the contrary intention appears in the disposition creating the trust: Law of Property Act, 1925, s. 26 (3). It is true that in this particular instance the provision is not quite free from ambiguity if the Acts are construed as requiring undivided shares to be created by way of trust for sale, for there are a number of cases which have demonstrated the peculiarity of statutory trusts, *e.g.*, *Re Flint*, [1927] 1 Ch. 570, where a right of pre-emption attaching to the original express trust or power to sell was destroyed by the statutory trust for sale arising. Consequently, it seems material to remember that the cases on statutory trusts for sale must be applied to undivided shares created under an express trust for sale with some caution.

We have also noted that the sub-section does not apply where the grantees are not all of full age, and this appears to be a genuine case of omission. The Act of course provides that an infant cannot hold a legal estate: Law of Property Act, 1925, s. 1 (6); and technically it is supposed that section 34 (2) cannot make it do so since it can only apply where *all* the grantees are of full age. Under section 19 of the Law of Property Act, 1925, provision is made where property is conveyed to an infant or to two or more infants or to infants with persons of full age jointly, but no provision is made where property is conveyed to infants in common with persons of full age. If the conveyance is made to A, B and C upon trust for sale for themselves beneficially in undivided shares and C is an infant (which is the most likely case), then A and B hold upon trust for sale for the three of them: section 19 (5). It is thought that the effect would be the same if a conveyance was made to A, B and C (C being an infant) as joint tenants as part of the partnership property, although section 19 (2) obviously contemplates a joint tenancy in equity as well as law. *Probably* the same result must be achieved if a conveyance is made to A, B and C as tenants in common, because it would be held that C could not take a legal estate, A and B could only take a legal estate as joint tenants upon the statutory trusts for sale and that this would not affect the beneficial interests in undivided shares in the proceeds of sale.

UNDIVIDED SHARES CREATED BY WILL.

Where undivided shares are created by will either by a devise or bequest or by an appointment under a power, at least if the undivided shares take effect in possession immediately, this operates as a devise, bequest or appointment upon the statutory trusts for sale. Instead of the beneficiaries being the trustees it operates in favour of the trustees for the purposes of the Settled Land Act or, if none, the personal representatives of the testator (who are the trustees for the purposes of the Settled Land Act in the last resort anyhow: Settled Land Act, 1925, s. 30 (3)). If these trustees are separate from the personal representatives they are entitled to an assent upon the statutory trusts for sale. If, however, the beneficiaries are of full age, presumably they could demand that the trustees should direct an assent in their favour provided that no more than four take the legal estate: Law of Property Act, 1925, s. 3 (1) (b). As far as title is concerned such an assent would certainly be valid: Administration of Estates Act, 1925, s. 36 (7), provided that there were no inconvenient recitals: *Re Duce and Boots' Contract*, [1937] Ch. 642.

It may be convenient here to point out that, if a will was executed prior to 1926, disposing of one undivided share, then the effect of the statutory trusts for sale has been held to constitute ademption of the devise, because it has ceased to be realty and become pure personalty or an interest in the proceeds of sale: *Re Kempthorne*, [1930] 1 Ch. 268; *Re Newman*, [1930] 2 Ch. 409. The effect of these cases, which turn upon the general principle of conversion involved in the effect of the statutory trusts: see *Re Price*, [1928] Ch. 579; *Re Hind*, [1933] Ch. 208, has been somewhat modified by the decision in *Re Warren*, [1932] 1 Ch. 42, where it was held that confirmation of the will by a codicil, even though it did not mention the land, was sufficient to prevent ademption. It should, however, be pointed out that this case must not be taken to cover every codicil confirming a will after 1925, because it was there laid down that it depended upon the proper construction of the intention of the testator.

UNDIVIDED SHARES CREATED UNDER A SETTLEMENT.

Where persons are entitled to undivided shares in land held as settled land and where these shares fall into possession the trustees for the purposes of the Settled Land Act, 1925, are entitled to call for a conveyance or assent to them of the land as trustees upon the statutory trusts for sale: Settled Land Act, 1925, s. 36 (1). In practice this will normally arise where the undivided shares are the ultimate limitation and often as not are not preceded by any limitations outstanding under the settlement. So, a common case is where land has been left to a widow for life and after her death to be divided among her children. The problem of vesting the legal estate then falls into one of two categories: (a) The personal representatives of the original testator may never have made any assent, in which case they will either assent to the trustees under section 36 of the Settled Land Act or if all the beneficiaries are of full age and so demand will assent to them personally, taking advantage of the Administration of Estates Act, 1925, s. 36 (7). (b) The personal representatives will have made a vesting assent under the Settled Land Act, 1925, to the widow as tenant for life.

In the second case the correct procedure on the widow's death is more complex. In *Re Cugny's Will Trusts*, [1931] 1 Ch. 305, the widow appointed the trustees of the settlement to be her personal representatives and they were directed by the Court to vest the property in themselves as trustees for sale. So far no real difficulty arises, because the personal representatives and the trustees were the same persons. The *ratio decidendi* is of some importance and was stated and approved by Bennett, J., in *Re Thomas*, [1939] Ch. 513, in the following words: "The land is at the moment held in trust for persons entitled in possession under a trust instrument in undivided shares, and, although subject to those trusts, it is still notionably for the purposes of the [Settled Land] Act to be regarded as settled land."

Strictly applying this principle, it would seem that notwithstanding that the settlement comes to an end on the death of the tenant for life (see *Re Bridgett and Hayes' Contract*, [1928] Ch. 163), the trustees of the settlement should take out a special grant under section 22 of the Administration of Estates Act, 1925, and the general personal representatives take out a grant "save and except settled land". Prior to any grant being taken out the estate would vest in the special personal representatives or the trustees of the settlement. If, however, a general grant without exception of settled land is taken out, presumably the legal estate then vests in the general personal representatives; or at least this was assumed in *Re Thomas* (*supra*). But such general personal representatives hold the legal estate, subject to the costs of administration, upon trust to assent to the trustees of the settlement upon the statutory trusts for sale: *Re Thomas* (*supra*). This case was very peculiar, because the trustee of the settlement was an administrator *de bonis non* of the will of the testator who took out administration after the death of the life tenant. It should be pointed out that this administrator was only a trustee of the settlement by virtue of section 30 (3) of the Settled Land Act and that he was a sole trustee.

These decisions present one peculiar feature, namely, that the land apparently remains notionably settled land notwithstanding that it is to be held upon the statutory trusts for sale and the existence of a trust for sale is intended to prevent land being settled land: Settled Land Act, 1925, s. 1 (7). This peculiarity is even more marked when it is observed that prior to the conveyance or assent the land is to be held by the estate owner upon the trusts also affecting the assent or conveyance, namely, upon the statutory trusts for sale: Settled Land Act, 1925, s. 36 (1). Actually the provision itself is not a little peculiar. Suppose A to be the tenant for life holding under a vesting deed and by reason of forfeiture (*e.g.*, marriage of widow of settlor) the property becomes vested in tenants in equal shares, A then apparently holds the property upon the statutory trust for sale. This will not affect the vesting of the legal estate, but it might affect the powers of the estate owner: cf. *Re Gray*, [1927] 1 Ch. 242.

These provisions assume that until undivided shares fall into possession the land remains settled land. In fact, it assumes what is explicit in section 36 of the Law of Property Act, 1925, with regard to joint tenancy: cf. *Re Gaul and Houlston's Contract*, [1928] Ch. 689. It is, however, clear that the existence of undivided shares in

possession prevent the continuance of the land as settled land notwithstanding limitations, which would otherwise constitute the land settled land. For example, in *Re Gaul and Houlston's Contract* (*supra*) two persons were joint tenants in fee simple subject to outstanding charges created voluntarily or in consideration of marriage (Settled Land Act, s. 1 (1) (v)), and it was held that the statutory trust for sale did not arise because it was settled land : Law of Property Act, 1925, s. 36 (1). Had the joint tenants in fact held in undivided shares then the legal estate would have had to be conveyed to the trustees of the settlement on trust for sale.

This gives rise to an important and difficult question, namely, when there are undivided shares in possession for the purposes of section 36 of the Settled Land Act. " Possession ", of course, " includes receipt of the rents and profits, or the right to receive the same, if any " : Settled Land Act, 1925, s. 117 (1) (xix), and normally the existence of an outstanding term, *e.g.*, to secure portions, would not affect the right to " possession "; but this is not inevitably the case. In *Re Stanford and Warrington* (No. 2), [1927] 2 Ch. 217, the fee simple was vested in two persons in undivided shares subject to a long term vested in trustees upon trust to collect the rents and profits and pay off certain incumbrances, and it was held that the land remained settled land and the trustees of the term were the statutory owners under section 23 of the Settled Land Act, 1925. Something of the same sort may be found in *Re Frewen*, [1926] Ch. 580, where the trustees held upon trust to pay two-thirds of the income to A during his life and the remaining one-third was to be accumulated and held as capital money under the Settled Land Act, 1925, and it was held that the trustees were statutory owners. This latter case presents even greater difficulties than the former, but both require examination more in detail when, as we hope, we can examine the whole problem of what constitutes an undivided share for the purposes of this legislation. It must suffice at this stage to emphasise that section 36 of the Settled Land Act only applies where the undivided share is in possession. Where there is settled land and the undivided share is not in possession the principles of the Settled Land Act apply, at least so far as relates to the legal estate which is our immediate concern.

Cases not Covered by Express Wording.

We now come to the most difficult aspect of the problem, namely, those cases, many of them not infrequent, which do not fall naturally and expressly within the wording of the statutes already discussed. In order to put these examples in perspective we must now refer to some other sub-sections. First, section 1 (6) of the Law of Property Act, 1925, states quite briefly that no legal estate is capable of subsisting or being created in an undivided share in land : a curious provision because " land " does not include an undivided share in land, and there are numerous other provisions which would seem to make it unnecessary. Secondly, section 3 (1) (b) of the same Act declares that if the proceeds of sale are held upon trust for persons in undivided shares of full age and absolutely entitled such persons shall not be entitled to call for the legal estate in undivided shares, but they may have the property conveyed to them as joint tenants upon trust for sale, and if more than

four are named then the first four take. Thirdly, section 34 (1), also of the Law of Property Act, enacts that " an undivided share in land shall not be capable of being created except as provided by the Settled Land Act, 1925, or as hereinafter mentioned ". As the purpose of section 34 is to prevent an undivided share being created in land : *Re Kempthorne*, [1930] 1 Ch. 268, the language cannot be regarded as happy, more particularly because the section does not cover all cases other than those where there is settled land. Fourthly, section 36 of the Settled Land Act says that " an undivided share shall not be capable of being created except under a trust instrument or under the Law of Property Act, 1925, and shall then only take effect behind a trust for sale ". This express reference to a trust for sale in connection with creating an undivided share in " land " seems even less reasonable. Either it means that an undivided share cannot be created at all or else that a trust for sale does not always arise. With this diversity of provisions one would have supposed that all possible cases were dealt with, and it may be that they are, but this is by no means certain. The two major problems arise from (i) grants to trustees for persons in equal shares, and (ii) grants to persons who in fact hold as tenants in common in equity (or would have done so prior to 1925) but where there is nothing to show that they so hold on the face of the conveyance. A minor problem exists about the wording " and shall then only take effect behind a trust for sale ".

(i) Grants to Trustees for Persons in Equal Shares.

Supposing that a grant be made to A and B in fee simple upon trust for C and D in equal shares, what is the effect of the legislation. Mr. Lightwood, it is thought, takes the view that the effect of all or some of these provisions is that A and B hold as joint tenants, which, apart from statute, they clearly must, upon the statutory trust for sale for C and D in undivided shares, which, it is submitted, is by no means so clear. So far as we know the question has never been raised before the Courts.

The difficulty of applying the provisions of the Property Legislation lies in the fact that the land is not expressed to be conveyed to persons in undivided shares, neither is the conveyance a trust instrument for the purposes of the Settled Land Act, 1925 : see section 117 (1) (xxxi). At the same time C and D, apart from any statutory interference, do take an equitable interest in undivided shares in land : see Settled Land Act, 1925, s. 117 (1) (ix). It is, of course, arguable that the prohibition is intended to apply only to legal estates and that, consequently, A and B take as joint tenants upon trust and that C and D take equitable interests in realty. The objection to this course is that A and B have no implied power of sale or other disposition of the property, and consequently the scheme of the Act breaks down, since all the equities are then brought on to the title.

Incidentally there is another objection in that no partition can be made under the Law of Property Act, 1925, s. 28 (3), because there is no trust for sale, and, of course, the Partition Acts have been repealed. A partition could again only be effected by bringing all the equities on the title, and even then would be possible where all the beneficiaries are *sui juris* and absolutely entitled.

From the point of view of convenience, therefore, it is natural that the Court should hold that a statutory trust for sale is created, and for this purpose reliance might be placed on section 36 (3). But this does not really solve the conveyancing problem, because the trustees for sale might be A and B, who do not seem to be covered by any of the statutory provisions, or C and D, to whom the grant in undivided shares is effectively intended to be made. In practice, this difficulty can always be avoided, and in the uncertain state should be avoided by making both A and B and C and D convey, remembering that the purchase money must be paid to all of them (!) and that on the death of any one of them a new trustee must be appointed. Much the same answer may be given where a grant is made to A upon trust for A, B and C in equal shares (or "as part of the partnership property"). The only difference being that if A is a sole trustee for sale he must appoint a new trustee before he sells : Law of Property Act, 1925, s. 27 (2).

This does not quite cover the possibilities of interpretation, however. A further, and perhaps more logically acceptable, construction of the Act is that on such a conveyance C and D take nothing at all. Whether we look at section 34 (1) of the Law of Property Act, 1925, or section 36 (3) of the Settled Land Act, 1925, the statutory provisions require compliance with the 1925 legislation and this form of conveyance complies neither with the Law of Property Act, 1925, nor with the Settled Land Act, 1925. Since an undivided share cannot be created otherwise, presumably the final limitation to C and D is invalid. If an invalid trust is created then A and B must hold on a resulting trust for the grantor since clearly A and B are not intended to take beneficially. Clearly in such a case they have no powers of disposition.

If, however, valuable consideration had been given, *e.g.*, the most likely case of partnership property, C and D would, presumably, have a contract to convey to them in a form appropriate to the Property Legislation, so that if a conveyance was made by A and B and C and D the purchaser would get an equitable interest and could call for the legal estate from the original grantee. Consequently, this alternative construction is another reason for joining the persons entitled in undivided shares in a conveyance in such cases. But this reason results in a further point, namely, the benefit of the equity remains in undivided shares and consequently any deceased tenant in common must be represented not by a new trustee but by personal representatives, and this is essential whether or not there are two surviving tenants in common. We will revert to this point in connection with transmission of the legal estate during tenancy in common.

We must emphasise that in the case with which we have been dealing a grantee from the owners of concurrent interests is fully aware that a tenancy in common has been created. It is an example where the property has been expressly conveyed upon trust for persons in undivided shares. To the argument that since the undivided shares are expressly created therefore section 34 (2) applies we would point out : (i) express to convey to grantees in undivided shares and to convey to joint tenants as trustees for persons in undivided shares are not the same, and (ii) if they were, ambiguity immediately arises in deciding who are the grantees to take upon trust for sale. What is more, this very point was taken in section 36 of the Law of Property Act, 1925, which

provides that where land is " beneficially limited to or held in trust for " persons as joint tenants the property is then held by the grantee on the statutory trust for sale. Such a difference in wording between clauses in other parts of this legislation has led to the Courts holding that a different interpretation was intended, *e.g.*, in the strong case of *Re Craven S. E.*, [1926] Ch. 985.

We can now turn to the problem where the undivided shares are not disclosed on the title. Such a case is clearly outside the scope of section 34 (2), and, therefore, must be regarded as quite distinct.

(ii) Land Granted on Undisclosed Tenancy in Common.

There are, in fact, two quite separate cases under this head. The first, and easiest, is a grant to A and B as joint tenants " beneficially entitled ", but for some reason equity regards A and B as tenants in common. So, for instance, purchase money may have been found in unequal shares or the property may be partnership property. The second is most likely to arise where a conveyance is made in severalty, but the grantee is, in fact, trustee for persons in undivided shares, which is commonest in partnership matters.

In the first case A and B must hold as joint tenants and consequently they can make a good title. Whether they hold on the statutory trust for sale is not so clear. It is submitted that they do not fall within section 34 (2) and they can only fall within section 36 (1) provided that " where a legal estate . . . is beneficially limited to . . . any persons as joint tenants " means where it is *expressed* to be so limited and not where in fact they take as beneficial joint tenants. Such a construction is very difficult having regard to the concluding phrase : " but not so as to sever their joint tenancy in equity ". In practice we do not think that any harm can come by treating it as a trust for sale so far as concerns making a title to a purchaser. With regard to use and enjoyment of the property we hope to deal with some of these problems in a future issue.

The second case is most important where a grant is made to A in fee simple, but in fact A holds upon trust, for instance, for a partnership. The natural interpretation of such a grant is that A can make a good title to a purchaser taking without notice of any trust. Probably if the case came up alone this would be the result, but so to hold jeopardises the position of all the uncertain cases. Section 34 (2), and, indeed, all the relevant sections, have nothing to do with notice unless they are construed strictly. If strictly construed we have seen that considerable difficulties will arise. On the other hand, if it is held that notice is immaterial and a statutory trust for sale arises then a good title can only be made provided there are at best two trustees to whom capital money may be paid. Obviously, this old-fashioned method of dealing with partnership property should not be employed, but unfortunately conveyancers do come across examples where it has.

It could be argued that the requirement of paying purchase money to two trustees for sale only applies where a purchaser has notice of the existence of the trust, and that a trust for sale does exist in the example postulated, but in the absence of notice a good title can be made. But there is absolutely nothing in this section which refers to notice—no

doubt primarily because a trust for sale was not anticipated of which a purchaser would not have notice.

It seems to us that the proposition that a grant to A in fee simple without more will create a trust for sale where the property forms part of partnership assets involves straining the construction of too many of the provisions of the Property Legislation to be acceptable. Nevertheless to hold otherwise seems inevitably to result in the creation of equitable undivided shares in land, though for the purposes of partnership assets it may become personalty. Such a result would be in line with the familiar decision of *Rochefoucauld* v. *Bowstead*, [1897] 1 Ch. 156, where the Courts allowed a trust to be created without evidence in writing notwithstanding the express provisions of the Statute of Frauds.

If in such circumstances A takes as trustee but not on trust for sale he can make a good title to a purchaser without notice. In practice where notice is obtained there will not be difficulty in making an appropriate title. But A has none of the powers of management conferred upon a trustee for sale : *Re Gray*, [1927] 1 Ch. 242, and must rely upon other powers in relation to the property.

Let it be remembered that this last case is the most likely to come before the Courts first. If it does and the Courts decide as we have thought not improbable, namely, that no statutory trust for sale is created, then the reasoning for creating trusts for sale in any other example will become more difficult to sustain.

TRANSMISSION OF THE LEGAL ESTATE DURING CONCURRENT OWNERSHIP.

One of the peculiarities of the modern method of dealing with concurrent interests is the devolution of the legal estate. Because, in the cases provided for by the statute, all undivided shares in possession take effect behind a trust for sale, devolution of the legal estate depends not on the rules governing devolution of beneficial interests but on the rules governing trusteeship. In this respect it is immaterial whether the undivided shares are created *inter vivos* or by will or under the Settled Land Act. The net result may be completely to sever the legal estate from the beneficial ownership.

(a) *On death.*—Because the legal estate will be vested in them as joint tenants on the death of any concurrent owner (trustee) the legal estate will survive to the remaining owner or owners (trustees). There will be no obligation to increase the number of trustees by replacing the deceased owner. If the trustees decide to appoint a new trustee the power is with them : Trustee Act, 1925, s. 36 (1); and they can ignore the personal representatives of the deceased beneficial owner subject to the Law of Property Act, 1925, s. 26 (3). Where all the original owners are dead the personal representatives of the last surviving owner appoint themselves or some other persons to act as trustees and they can ignore all the concurrent owners : Trustee Act, 1925, s. 36 (1) (b), subject to the limitations, if any, imposed upon their discretion by section 26 (3) of the Law of Property Act. The legal estate will be vested by virtue of the implied vesting declaration contained in the appointment of new trustees : Trustee Act, s. 40. No question will arise either of a conveyance or of an assent under the Administration

of Estates Act, 1925. It will be observed that there can only be an automatic devolution on death when the last surviving trustee dies, otherwise the owners of the legal estate simply decrease in number and the only proof of title will be proof of death.

(b) *Inter vivos.*—Since there can be an undivided share only in equity any disposition of an undivided share can only take effect in equity and will not affect the legal estate. So, if A and B hold on trust for sale for themselves in undivided shares, and if B sells his share to C, the transfer of the share to C would leave A and B trustees for sale for A and C in undivided shares and C would not be entitled to take B's place as a trustee. If there was such an agreement, which would involve A, it could be carried out only by an assignment in equity of the undivided share and an appointment of C in substitution for B by a deed of appointment and discharge under the Trustee Act, 1925, s. 36. This should be accomplished by two deeds.

If, on the other hand, there was a sale by B to A, leaving A solely entitled both at law and in equity, the Act provides no suitable machinery. It is provided that *in favour of a purchaser* a trust for sale will continue to subsist until conveyance to or by the direction of the persons beneficially entitled, which leaves the position except for deduction of title very obscure. It is doubtful, indeed, if a release of the legal estate by one trustee to another, and in most cases there is notice that the trustees hold on trust for sale, can have any effect at all. Equally the assignment of the equitable interest cannot affect the legal estate. A trustee cannot retire from the trust unless he leaves two trustees or a trust corporation : Trustee Act, 1925, s. 39.

It is presumed that the correct method of dealing with this problem is to bring the whole of the equities on to the title, by way of recitals, and then for A and B to convey by direction of themselves to A in fee simple. This would be a valid conveyance : Law of Property Act, 1925, s. 72 (4). This would put an end to the trust for sale for the purposes of section 23 and every other purpose and incidentally prove one more slit in the "curtain" set up by the Property Legislation of 1925.

(c) *Settled land.*—Where the undivided shares were created under the Settled Land Act, 1925, it will be recalled that normally the legal estate will not be vested in the beneficiaries at all. Consequently, dispositions will not affect the legal estate at all directly whether devolution occurs *inter vivos* or on death. It is only when the undivided shares fall into one hand that the question will arise of a proper disposition to get rid of section 23, which presumably will take much the same form as that outlined in the last paragraph.

It may be pointed out that any disposition by way of settlement of undivided shares is to operate only as a settlement of the proceeds of sale : Law of Property Act, s. 34 (4). Consequently, no tenant in undivided shares can ever claim to be a tenant for life for the purposes of the Settled Land Act and so claim to have the legal estate vested in him.

NOTES OF RECENT CASES.

1. *PROPERTY AND CONVEYANCING CASES.*

Vendor and purchaser—root of title—specific performance—Courts (Emergency Powers) Act, 1914.—*Colebrook* v. *Watson Investment Co.,* 60 T. L. R. 464, can be noted shortly, since the point is little likely to be troublesome. The root of title was a mortgage the recitals of which showed that although the mortgagee was selling without leave of the Court under the Courts (Emergency Powers) Act, 1914 (then still in force), the consent of the personal representative of the deceased mortgagor had been obtained. It was argued that, since the decisions on the 1939 Act that the mortgagor could not waive the necessity for an application for leave under that Act, the decision in *Re Sandow,* [1916] W. N. 262, that leave could be waived under the 1914 Act had been overruled. Vaisey, J., held that there were sufficient differences of wording in the 1914 and 1939 Acts to justify a different construction and that, accordingly, the decisions on the 1939 Act were distinguishable. The learned Judge also held that the decision in *Re Sandow* (*supra*), had been adopted by the text-books and accepted in practice and that, therefore, he would hold that the title was unexceptional.

Vendor and purchaser—requisition—repudiation by vendor—rescission by purchaser—recovery of deposit.—James Macara, Ltd. v. *John Donald Barclay,* [1944] 2 A. E. R. 31, contains facts so unusual that on its facts the decision can have little practical value, but this does not seem to affect the general principle involved. By the Law of Property Act, 1925, s. 49 (2) it is provided that in an action for return of deposit or where the Court refuses to grant specific performance the Court may order the repayment of any deposit. This section has not been litigated, but the jurisdiction came in question in this case because the plaintiffs sought to recover their deposit in an action where the contract was not completed and had the vendor defendant sought specific performance it would have been refused. Vaisey, J., said that the effect of the sub-section was correctly stated in Williams' *Vendor and Purchaser* (4th ed.), at p. 30, and Halsbury's *Laws of England,* Vol. 29, at p. 380, and that its purpose, and possibly sole purpose, was to remedy the law whereby a purchaser, though in a position to resist specific performance, could not recover the deposit: *Re Scott and Alvarez's Contract,* [1895] 1 Ch. 596; *Beyfus* v. *Lodge,* [1925] Ch. 350. In this particular case the vendor had acted towards a proposed requisitioning notice as if the property had not been sold and the learned Judge regarded this behaviour as sufficient to justify refusal to grant specific performance had such an action been brought and the defendant's behaviour generally as sufficient to enable the Court to exercise its discretion to order the return of the deposit in favour of the plaintiffs. The learned Judge expressed the view that under the section he had no power to order part only of the deposit to be returned, *e.g.,* by deducting expenses: it was all or nothing.

Another point that was discussed was whether a contract for sale with vacant possession was not capable of being rescinded or repudiated by the purchaser on the ground that prior to completion a notice of requisition had been served. This point has arisen in *Re Winslow Hall Estates Co.,* [1941] Ch. 513, and *Cook* v. *Taylor,* [1942] Ch. 349 (noted *ante,* vol. 7, p. 40). In the last case Simonds, J., held that where possession had actually been taken after contract and prior to completion the purchaser could recover his deposit. In *Re Winslow* (*supra*), Bennett, J., had held that the mere notice without taking possession was insufficient to set aside the contract. The learned Judge also referred to an unreported case, *Cramp*

v. *Hughes & Son,* in which Asquith, J., held that a notice of requisition operated to vest possession. In the circumstances the learned Judge intimated that he doubted the soundness of the decision of Bennett, J., so that the clause to be added to contracts of sale referred to in the note in vol. 7, p. 40, is more necessary than ever.

(1 K. & E., pp. 320, 321, 328, n. (*j*).)

Mortgage—Building Societies Act, 1939—*exercise of statutory power of sale—Reliance Permanent Building Society* v. *Harwood-Stamper,* [1944] 2 A. E. R. 75, is a case of some considerable importance, since it discusses the changed position of building societies when exercising the statutory power of sale caused by the provisions of the Building Societies Act, 1939, s. 10. The judgment also contains some useful observations on the position of a mortgagee generally.

Section 10 provides that on the exercise of a statutory or express power of sale where the mortgage has been made to a building society the vendor must " take reasonable care . . . to ensure that the price at which the estate is sold is the best price which can reasonably be obtained ". Any attempt to contract out of this section is void.

In discussing the position of the mortgagee selling independently of the 1939 Act, Vaisey, J., expressed the view that the law was stated inadequately in Fisher and Lightwood, *Law of Mortgage* (7th ed.), at p. 412, but the law is more accurately stated in Halsbury's *Laws of England,* Vol. 23, at p. 435, and *Coote on Mortgages* (9th ed.), at p. 927. In effect these statements impose no restrictions on the procedure of the vendor mortgagee except that he must act in good faith and take reasonable precautions to obtain a *proper* (not the best) price.

The learned Judge then went on to contrast the position of the mortgagee vendor with the ordinary fiduciary vendor, whose duty it is to secure the most advantageous sale possible, but who was entitled to act with reasonable discretion in this respect: cf. *Grove* v. *Search* (1906), 22 T. L. R. 290, cited at pp. 79 and 80. His Lordship then came to the opinion that the building society was in the position of an ordinary fiduciary vendor subject to three qualifications. These three qualifications were as follows: (i) The society may consult its own convenience as to the time when it will sell; (ii) it may sell in any of the ways provided by the Law of Property Act, 1925, s. 101, that is by auction or private treaty, in lots or as a whole; (iii) it is protected against involuntary loss by the Law of Property Act, 1925, s. 106. But subject to this the society must take all reasonable steps to secure the best price.

On the facts of the case the society had only put the property into the hands of a single agent, and did not sell by auction. The learned Judge held, with some hesitation, that on the facts the society " did just fulfil its obligations under the section ": at p. 82. The learned Judge reserved the question whether the burden of proof was on the mortgagor or society. However, he expressed his view of the general position of the society with regard to the record of the steps taken by the society to secure the best price as follows (at p. 83): " I think that the building society must now take just as much care as a trustee has always had to take in relation to trust money, so that just as when a trustee is challenged by the beneficiary to account for what he has done, so I think a building society must be prepared, when challenged by the mortgagor, to show exact particulars of the care which he has taken to make sure that the price which has been obtained for the property is a price upon which no advance was available at the moment ".

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2. *WILL CASES.*

Commorientes—statutory presumption—bombs and fire.—Three cases have been decided on the application of the statutory rule for the presumption of the order of death where two persons die in the same disaster: Law of Property Act, 1925, s. 184. In *Re Grosvenor,* [1944] 1 Ch. 138; 113 L. J. Ch. 113, the Court of Appeal (Luxmoore, L.J., dissenting) has held that (i) the section applies to survivorship for the purpose of determining the order of date of a will as well as other matters affecting the title to property; (ii) deaths may be simultaneous; (iii) simultaneous deaths do not fall within the purview of the section; and (iv) the Court must be satisfied that the proper inference from the facts is that the parties died consecutively and that the order of death is uncertain.

In *Re Grosvenor* (*supra*) the facts were that there were five persons presumably in the same shelter in a house which received a direct hit in an air-raid. There was no evidence directly to show when any party died, but they were all killed by the bomb which exploded in the shelter. The Court, on these facts, drew an inference that all the persons died simultaneously and that there was no provision covering this case in the Law of Property Act. Lord Greene, M.R., having examined the authorities and come to the conclusion already mentioned, concluded as follows: " In my opinion the only proper inference to draw is that all the persons concerned died simultaneously. If this inference cannot be drawn in this case I cannot imagine any case in which it could be drawn. It must not, however, be taken that in every case in which two persons are killed by the same bomb the same inference ought to be drawn. . . . I should add that I pay no attention to the fact that no witness in the present case expresses the opinion that the deaths were simultaneous. Such evidence would, in my view, have been both useless and superfluous, having regard to the facts which were proved ". The effect of this judgment and that of Goddard, L.J., who agreed with the learned Master of the Rolls, appears to be that a modified burden of proof lies on the person setting up the section to show that the order of deaths was uncertain. In other words, where doubt exists, if the reasonable inference is that the deaths were simultaneous the section does not apply, but if the reasonable inference is that the order of death was uncertain then the section does apply.

The relevant words of the section, which caused difficulty, read as follows: " Where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others such deaths shall (subject to any order of the Court) . . . be presumed to have occurred in order of seniority ". The words in brackets were considered by the Court to present considerable difficulty. Greene, M.R., having said that it was difficult to find a sensible meaning for the words, suggested that the words might refer to subsequent orders of the Court in the event of fresh evidence becoming available. Luxmoore, L.J., took a different view. He thought that all they meant was that the presumption in the Act was not irrebuttable, opining that " there is no presumption against tautology, even in an Act of Parliament ". The question did not arise directly and, therefore, remains unsolved.

In *Re Mercer,* [1944] 1 A. E. R. 759, Morton, J., had to consider the facts where a husband and wife were killed by burning and possibly by a high explosive bomb. A high explosive bomb fell on the block of flats and so did incendiaries. It was not proved whether the spouses were in the same room or killed by explosion or by fire. The learned Judge held that he could not draw an inference that the husband and wife had died simultaneously. He pointed out that in *Re Grosvenor* (*supra*) the facts were such as to lead to an inference that all five persons were in the same shelter,

that the room was not large, that the bodies were so mutilated as to be unrecognisable, and that the bomb had penetrated to the basement: hence the inference was so strong as to amount almost to a matter of " certainty ".

The learned Judge also observed, at p. 760, " but it seems to me that the cases where the Court can find as a fact that two or more persons have died simultaneously must occur very rarely. . . . I hold, therefore, that the Law of Property Act, 1925, s. 184, does apply to this case; indeed, I think it must apply to the great majority of cases where two or more persons are killed by bombs ". The effect of this decision, if it be followed, will be apparently that if there is no evidence of how the parties died, except that they seem to have died in the same calamity, then the Act will apply, but if there is evidence that raises an inference that they died together the Act will not apply. Presumably, the " inference " must be an " inference " such as would be used as proof in a civil suit and not equivalent to " the beyond reasonable doubt " of the criminal law: see *per* Goddard, L.J., 113 L. J. Ch., at p. 121.

The view of Morton, J., that most bomb deaths must fall within the Act seems to be confirmed by *In bonis Howard,* [1944] P. 39. There the parents and a son were killed in the same explosion, but while the bodies of the parents were shattered that of the son was not and apparently they were sleeping in different rooms. Henn Collins, J., held that the Act applied so far as concerned the son, since it was clearly uncertain whether the son survived the parents, but *Re Grosvenor* (*supra*) covered the case of the parents and, therefore, the wife took nothing.

Soldier's will—member of the W.A.A.F.—The nature of actual military service in this war has proved to be very different from the last, and it is becoming increasingly difficult to determine in individual cases whether or not the Wills Act, 1837, s. 11, applies. *In the estate of Rowson,* [1944] 2 A. E. R. 36, is not very satisfactorily reported since it does not show where and when the document was made which was admitted to probate, though the learned Judge (Wallington, J.) carefully stated that he was admitting the document to probate only on the particular facts. The following statement sets out the particular facts as reported: " this lady was mentioned in dispatches and she was in the balloon command, at another time in bomber command, at several stations had been in charge of the Women's Auxiliary Air Force, and even at the date of her death was still on the strength of that force at the depot at Insworth in Gloucestershire ".

It should be pointed out that the material issue is not whether a testator has been in actual military service, or is at the date of his death in military service, but whether the testamentary document (if any) was executed at a time and place when the testator was in actual military service. This has become abundantly clear from the recent decisions in *In the estate of Anderson,* 60 T. L. R. 40 (noted *ante,* vol. 8, p. 168), *In the estate of Rippon,* [1943] P. 61, *In the Estate of Spark,* [1941] P. 115, and *In the estate of Gibson,* [1941] P. 118 n. (*noted ante,* vol. 7, p. 40). It seems clear enough that a member of the W.A.A.F., even in this country, may be in actual military service sufficiently for the purposes of section 11 of the Wills Act, but the difficulty lies in determining when this will occur. It is submitted that a W.A.A.F. living at home and working in the Air Ministry, though awarded a mention in dispatches, would not be in actual military service (on the authorities as they stand at present), but on the other hand it is not clear that if she was living in " digs " or in a W.A.A.F. camp she might be. Whether danger from " flying bombs " is material remains to be determined.

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3. *INCOME TAX CASES.*

By LEONARD STEIN, Barrister-at-Law.

[The cases selected for notice are not necessarily the most important from the standpoint of the income tax practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Surtax—tax free annual payment—Finance Act, 1938, *s.* 38 (1); *Finance Act,* 1941, *s.* 25.—*Fitzgerald* v. *C. I. R.,* [1944] Tax Leaflet No. 1288, decided (*inter alia*) that in section 25 (1) of the Finance Act, 1941, the words "has not been varied on or after that date" (sc. September 3, 1939) are to be construed as meaning on or after September 3, 1939, and before the enactment of the Finance Act, 1941, which received the Royal Assent on July 22, 1941. The question arose in this way: A deed of covenant executed in March, 1939, provided for annual payments, during the joint lives of the covenantor and the beneficiary, of such amount as would, after deduction of tax, leave £2,100. Power was reserved to the covenantor, with the consent of a third person, to revoke the deed after the expiration of seven years. By reason of the proviso to sub-section (1) of section 38 of the Finance Act, 1938, the power of revocation did not bring the annual payments within the scope of that sub-section, and the gross equivalent was accordingly claimable by the covenantor as a deduction in the computation of his total income for surtax purposes. The effect of section 25 of the Finance Act, 1941, was to reduce the "stated amount" of £2,100 to £1,448 5s. In March, 1942, the covenantor executed a supplemental deed providing that the principal deed should have effect as if section 25 of the Finance Act, 1941, had never become law, to the intent that the net amount of £2,100 should be deemed to be, and always to have been, payable. The Crown's contention was that the amount claimable as a deduction in respect of the annual payments was limited to the gross equivalent of £1,448 5s.; that payments in excess of the reduced amount were payable, not under the principal deed, but under the supplemental deed; and that such payments were caught by section 38 (1) of the 1938 Act, since the power of revocation reserved by the principal deed was exercisable within a period of less than six years from the time when the first payment under the supplemental deed became payable, so that payments under the supplemental deed were not saved by the proviso to section 38 (1). On behalf of the covenantor it was sought to turn the flank of this argument by contending that section 25 of the 1941 Act did not apply, since the principal deed *had* been varied after September 3, 1941, and that, accordingly, the full net amount of £2,100 remained payable under the principal deed. It was held by Macnaghten, J., that the words "has not been varied on or after that date" referred to a variation made on or after September 3, 1939, and before the enactment of the 1941 Act; that there had, therefore, been no such variation as to exclude the application of section 25; and that it followed that the payments in excess of the amount fixed by that section were caught by section 38 (1) of the 1938 Act.

Income tax—tax free testamentary annuity—annuitant's repayment claim.—In *C. I. R.* v. *Cook,* [1944] Tax Leaflet No. 1289, the Court of Session expressed some decided views on the treatment of repayment claims arising from tax free annuities. The question before the Court related to a repayment claim for 1939–40. The annuitant was entitled, under a will,

to a tax free annuity of £100. It was common ground that the case fell within the rule in *Re Pettit,* [1922] 2 Ch. 765, with the result that, the annuity being the annuitant's sole income, the whole amount of any tax repaid was payable over to the trustees. Repayment claims had for some years been made and allowed, but when it came to the claim for 1939–40, the Revenue authorities made a new departure by rejecting the claim *in toto.* This they did on the ground that what the annuitant was entitled to was an annuity of £100 plus the tax (if any) falling ultimately to be borne by her in respect thereof; that, her sole income consisting of the annuity and the exemption limit being (as it then was) £125, she was not liable to bear any tax; and that, accordingly, her gross income must be taken to be £100, the amount, in fact, received by her, with the result that she had suffered no deduction of tax and was entitled to no repayment. The Court unanimously and emphatically rejected this reasoning. It was pointed out in the judgments that (with tax at 7s.) the annuity had cost the trustees £153 16s. 11d., and that the £53 16s. 11d. representing tax paid by deduction must be treated as having been paid by the trustees, not on their own behalf, but on behalf of the annuitant. Her income must, therefore, be taken to consist of the whole gross sum of £153 16s. 11d., the £53 16s. 11d. intercepted by the Crown being no less a part of her income than the £100 which actually came into her hands. " The payment of the tax is made by the trustees in satisfaction of the respondent's liability to the Inland Revenue and is, therefore, treated as payment *pro tanto* of her income. Her income from the trust is, accordingly, the grossed income ". The Court brushed aside as irrelevant any transactions between the annuitant and the trustees which might result from the application of the rule in *Re Pettit,* above. This was *res inter alios acta* and had nothing to do with the computation of the gross income by reference to which the annuitant was entitled to claim repayment of tax in a question between herself and the Revenue authorities. Lord Moncreiff observed that, if—as the Court had been given to understand—it was the practice, in dealing with repayment claims, to distinguish between annuities which were, and annuities which were not, of the type with which *Re Pettit,* above, was concerned, " I can only say that, in my opinion, it is a practice which is entirely without warrant and which should now be reformed ".

Income tax—tax free annuity—will made before September 3, 1943—confirmatory words in codicil made after that date—Finance Act, 1941, *s.* 25.—In *Re Waring, Westminster Bank* v. *Awdry,* [1942] Ch. 426 (see *The Conveyancer,* March, 1943, at p. 65), it was held by the Court of Appeal that, for the purposes of section 25 of the Finance Act, 1941, the date of the making of the provision for a testamentary annuity is to be taken to be the date of the will and not the date of the testator's death. It was further held that, where the testator has made a codicil not containing a confirmatory clause, it is immaterial, for the purposes of section 25, that the date of the codicil was later than September 3, 1943. The application of section 25 in a case in which a codicil made after September 3, 1943, did contain a clause confirming a will made before that date was considered in *Re Tredgold,* [1943] Ch. 69. It was there held by Simonds, J., that in such a case the date of the provision must be taken to be the date of the codicil so as to take the annuity outside the application of section 25. This decision has now been overruled by the Court of Appeal in *Re Sebag-Montefiore, Sebag-Montefiore* v. *Alliance Assurance Co.,* [1944] W. N. 158. The testatrix had, by her will, dated August 28, 1937, bequeathed various annuities. By a codicil made on September 25, 1939, she directed (*inter alia*) that one of these annuities should be increased by £100, and went on to say: " In all other respects I confirm my said will ". Except for the increase in the

amount of one annuity, the codicil did not affect the annuities bequeathed by the will. It was held by the Court of Appeal that, save in the case of the extra £100 given to one of the annuitants by the codicil, the annuities were within the scope of section 25. Notwithstanding the confirmatory words in the codicil, the document making provision for the annuities was the will. As to the annuity which was increased by the codicil, the increase was not a variation within the meaning of section 25, and it was only the additional £100 that was outside the application of the section.

Income tax—annual payment—payment in arrear—rate at which tax deductible—Income Tax Act, 1918, *All Schedules Rules, rule* 19; *Finance Act,* 1927, *s.* 39.—In *Re Sebright, Public Trustee* v. *Sebright,* [1944] W. N. 114, a jointure rentcharge was payable, under a testamentary power of appointment, at the rate of £600 a year. The payment of the jointure had fallen into arrear for several years, but the time arrived when there was enough income in hand to pay off the arrears. The income out of which the arrears would be paid had borne tax at 10s. in the £, and a question now arose as to the rate at which tax was deductible on payment of the arrears. Section 39 (1) of the Finance Act, 1927, provides for deduction of tax, in cases where tax is deductible under rule 19 of the All Schedule Rules, " at the standard rate for the year in which the amount payable becomes due ". It was held by Vaisey, J., that the words " becomes due " do not mean the same as " becomes payable ", but refer to the date at which the payment ought to have been made. Accordingly, tax was deductible at the rate or rates appropriate to the several years of assessment in which the payments would have been made if the trustee had been in a position to discharge his obligations punctually, irrespective of the rate at which tax had been paid or borne on the income out of which payment was now to be made in arrear.

Surtax — investment company — apportionment of income to person treated as a member—Finance Act, 1939, *ss.* 14, 15.—One more illustration of the application of section 15 of the Finance Act, 1939, is provided by *A. G. Chamberlain and Talbot Investment Co.* v. *C. I. R.,* Tax Leaflet No. 1293. Section 15 of the Finance Act, 1939, forms part of the companies' surtax legislation as it relates to investment companies. Sub-section (1) provides that, for companies' surtax purposes, a person who is not a member of the company may, where an investment company is concerned, be treated as a member if he " is or is likely to be able to secure that income or assets, whether present or future, of the company will be applied either directly or indirectly for his benefit ". By sub-section (6) (a), " references to a person shall, in the case of an individual, be deemed to include the wife or husband of the individual ". In apportioning the income of the company among its members, the Special Commissioners may, under sub-section (2), apportion to a person who is treated as a member by virtue of sub-section (1) " such part of the income of the company as appears to them to be appropriate ". The elaborate machinery devised for avoidance of surtax in the *Chamberlain and Talbot Case,* above, need not here be described in detail. The essence of the scheme was that an individual, C, had indirect control of the company so as to be able to secure that the whole of its income should be distributed by way of dividend to a second company also under his control. His control of the second company enabled him to secure that, subject to the payment of a dividend on preference shares held by himself, the whole of its income should be distributed by way of dividend to the trustees of a

settlement made by him. Of this settlement he was a trustee, with power to remove any of his co-trustees. The income of the settled fund was payable to any one or more of the objects of a discretionary trust, these being C's wife and children. On these facts Macnaghten, J., agreed with the Appeal Commissioners that C was a person who could be treated as a member of the company, and further agreed that it was appropriate to apportion to him the whole income of the company. In the years of assessment in question the company had, in fact, distributed part of its income to shareholders other than the second company, thus placing it out of the reach of C or his wife. It was held, however, that this was immaterial in considering whether the apportionment of the whole income to C was appropriate, the question being, not what had actually happened to the company's income, but whether C was in a position to cause it to travel into the hands of himself or his wife. The learned Judge left open the question whether, in a case in which the Court disagreed with the Appeal Commissioners as to what was an appropriate apportionment, it could substitute an apportionment of its own, or whether the appropriateness of an apportionment is a question of fact, so that an apportionment confirmed by the Appeal Commissioners cannot be disputed save on the ground that there is no evidence to support it.

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LAW OF PARTNERSHIP[1].

The Partnership Act, 1890, is one of the examples not infrequently cited both for and against the proposal for codification of English law. It is frequently said of it, as Dr. Hanbury says, that it is a perfect piece of work, and that any statement of the law must, therefore, constitute a commentary on the Act. These two books, in fact, give opportunities for comparing the methods of codification with those of exposition. "Pollock" has always been in the nature of a commentary on the code which is now the Act (see the interesting history of the Act contained in the Preface to the 12th edition, reprinted in the current edition). "Strahan and Oldham" is much more an exposition in which the order of topics is determined by the author's notions of logical treatment and which combines statements of the law leading up to as well as explaining any extracts from the sections (the Act as a whole being reprinted in the back of the book). "Pollock" gives a carefully collected series of illustrations of the more important sections, but "Strahan and Oldham" incorporate such facts of cases as may be desirable and relevant in the course of the exposition.

From the point of view of reference we think that "Pollock" is the easier and better book to use and the Index is adequate. That is the value of the code. If it contains an answer to a problem it is accessible. But in point of fact either there must be irrelevancies or no answers when it comes to discussions of many points not directly within the code. For example, the rules governing the creation as distinct from the existence of a partnership are not within the code; as, for intance, whether writing is necessary to create an enforceable partnership for three years. For this we should look to "Strahan and Oldham" rather than "Pollock": it is natural and logical in an exposition to introduce other related branches of the law. The Digest or Code does not seem capable of this, since once repetition is introduced half the value of the code probably disappears. Actually "Pollock" itself illustrates the point to some extent in Part II on Procedure and Administration, where

[1] Pollock's Law of Partnership, 14th ed., by J. W. Cecil Turner, M.C., M.A., LL.B., of the Middle Temple, Barrister-at-Law, Fellow of Trinity Hall, Cambridge. The Law of Partnership, by J. Andrew Strahan and Norman H. Oldham, sixth ed., by H. G. Hanbury, D.C.L., Fellow of Lincoln College, Oxford, Lecturer at Oriel College, Oxford; of the Inner Temple, Barrister-at-Law, etc., etc.

a number of rules have been set out that are not contained in the Partnership Act. Without this addition the book would lose some of its practical value, but administration has had to be worked out by rules deduced from general principles.

It is no disparagement to "Pollock" to say that, probably, even in a branch of the law so mature and within its compass so complete, it is impossible to make a series of propositions stated shortly constitute a logical and coherent account of a subject that may fix in the mind of the reader the principles of his subject. Obviously if the code is to be reasonably complete it must state with not less emphasis minor and major premises. It is inconceivable that every section of a code shall have relatively equal importance, but it is equally impossible to differentiate. Furthermore, some general principles must have application in several branches of the law but can be stated only once. Actually this is less true of partnership than many branches of the law, as may be seen by reference to the Table of Statutes in "Strahan and Oldham"—there is no Table of Statutes in this edition of "Pollock".

Both these editions are well done, as would be expected from the learned editors, though again the maturity of the subject has not called for much fresh matter. We would, however, respectfully suggest that if the Precedents are to be retained at the back of "Pollock" they should receive a modern redressing. "This Indenture", for eaxmple, has rather an archaic sound in these days when deeds are not indented and are usually described by reference to their character. Actually we doubt the value of precedents of this kind.

Nevertheless we should finally come to the conclusion that while practitioners obviously must have "Pollock" we think that they would benefit much from "Strahan and Oldham".

Solicitors' Handbook of War Legislation. By S. M. KRUSIN and the late P. H. THOROLD ROGERS. Vol. 5. By MAURICE A. SHARE and S. M. KRUSIN. London: Solicitors' Law Stationery Society, Ltd. (£2 10s.)

This work is now so well known to practitioners that it needs no introduction. The main Acts which it contains are the War Damage Act, 1943, and the Courts (Emergency Powers) Act, 1943 (both consolidating statutes). The very important Treasury Directions which revolutionised the situation in connection with cost of works payments for modern houses and which we have not seen printed in full elsewhere is to be found at p. 335.

The annotations, both in connection with the Courts (Emergency Powers) Act, 1943, and those requisite for bringing up to date the position in connection with earlier statutes (*e.g.*, the Landlord and Tenant (War Damage) Act, 1939) are excellent. In many cases the material includes notes of county court decisions where those are the only decisions which have been given.

From a short examination this volume would appear to be a worthy successor to the previous volumes. Acts to August, 1943, and decisions to October, 1943, are included.

BOOKS RECEIVED.

Burke's Loose Leaf War Legislation. Edited by HAROLD PARRISH. 1943. Nos. 12 to 15. 1943–4, Parts 1 to 8. London: Hamish Hamilton (Law Books), Ltd. 6*s.* each.

Burke's Encyclopaedia of War Damage and Compensation. Edited by HAROLD PARRISH. Supplemental Parts 14 and 15. London: Hamish Hamilton (Law Books), Ltd.

CORRIGENDUM.

Vol. 8, p. 309, note (*a*) should read—"This form was drafted by Mr. H. Samuels, of the Middle Temple."